147 U.S. 647

RECORD, CASE No. 13,661.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 107.

J. P. BAUSERMAN, ADMINISTRATOR OF THE ESTATE OF JAMES G. BLUNT, DECEASED, PLAINTIFF IN ERROR,

vs.

ELBRIDGE G. BLUNT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED SEPTEMBER 28, 1889.

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1 STATE OF KANSAS, } ss:
Leavenworth County, }

In the District Court in the County of Leavenworth, in the State of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant. } Petition.

The said Elbridge G. Blunt, the plaintiff above named, complains of the said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, the defendant herein, for that said James G. Blunt, in his lifetime, heretofore, to wit, on the first day of July, A. D. 1875, at Chicago, Ill., to wit, at said county, made his certain promissory note in writing of that date, and then and there delivered the same to said plaintiff, and thereby, for value received, promised to pay to said plaintiff or order one day after the date thereof, which period long since elapsed, the sum of three thousand two hundred and four and $\frac{34}{100}$ dollars, with interest thereon at the rate of ten per cent. per annum from date until paid, and thereby waived any and all rights under the laws of Illinois exempting real or personal property from execution or attachment and sale for payment of debts; and said plaintiff further avers that said James G. Blunt was, at the time of making and executing said note, a citizen and resident of this State of Kansas, and for a long time prior and subsequent thereto was such citizen and resident.

And said plaintiff further avers that said James G. Blunt died intestate on the — day of July, 1881, leaving property and debts in this State, and that there never was any administrator ap-
2 pointed on the estate of said James G. Blunt until said defendant was appointed such administrator, on the 14th day of December, 1885.

And said plaintiff further avers that said James G. Blunt had been absent from and out of this State of Kansas prior to his death and subsequent to the making of said note as aforesaid for more than five years.

And that said James G. Blunt has been absent from and out of the said State of Illinois prior to his death as aforesaid and subsequent to his making said note for more than five years; a copy of said note, with the indorsement thereon, is herewith filed, hereto attached, marked Exhibit No. 1, and made part hereof; yet said James G. Blunt and said defendant, though often requested, have not nor has either of them as yet ever paid to said plaintiff the aforesaid sum of money nor any part thereof nor any interest thereon, but to pay the same or any part thereof have hitherto and still do wholly neglect and refuse, except there was on said note on the first day of December, A. D. 1875, the sum of one hundred dollars, which is endorsed on the back of said note.

Wherefore said plaintiff prays and demands judgment against

said defendant for the sum of three thousand two hundred and four and $\frac{34}{100}$ dollars, with interest thereon at the rate of ten per cent. per annum from the first day of July, A. D. 1875, less the sum of $100.00 paid Dec. 1, 1875, and for costs of suit, &c.

J. D. SHAFER,
Attorney for Plaintiff.

3 The clerk of the district court in Leavenworth county will please issue a summons to the defendant in the above-entitled suit, directed to the sheriff of said county to serve, returnable in 5 days.

The plaintiff claims judgment for $3,204.34, with interest thereon, at the rate of 10 per cent. per annum, from July 1, 1875, less $100.00 paid Dec. 1, 1875, and for costs of suit, &c.

J. D. SHAFER,
Attorney for Plaintiff.

$3,204.34. CHICAGO, ILL., *July* 1, 1875.

One day after date I promise to pay to E. G. Blunt or order thirty-two hundred & four & $\frac{34}{100}$ dollars, at —, with interest at the rate of ten per cent. per annum, value received, hereby waiving and releasing any and all rights under and by virtue of all laws of the State of Illinois exempting real or personal property from execution, writ of attachment, and sale for the payment of debts.

[TRADE-MARK] JAS. G. BLUNT.

Indorsed: Dec. 1st, 1885, rec'd on the within note one hundred dollars.

(Endorsed:) No. 9370. Elbridge G. Blunt *vs.* J. P. Bauserman, adm'r, &c. Petition. Filed February 13, '86. John Rohr, clerk.

4 UNITED STATES OF AMERICA.

STATE OF KANSAS, } *ss:*
First Judicial District, Leavenworth County, }

The State of Kansas to the sheriff of Leavenworth county, in said State, Greeting:

You are hereby commanded to notify J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, that he has been sued by Elbridge G. Blunt in the district court sitting in and for said county of Leavenworth, and that unless he answer by the 10th day of March, A. D. 1886, the petition of the said Elbridge G. Blunt against him filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 18th day of February, A. D. 1886.

Witness my hand and the seal of said court, affixed at my office, in the city of Leavenworth, this the 13th day of February, A. D. 1886.

[SEAL.] JOHN ROHR, *Clerk.*

Endorsed: Summons, page 607. No. 9370. Docket 15. District court, Leavenworth county, Kansas. Elbridge G. Blunt *vs.* J. P. Bauserman, adm'r, &c. Issued Feb'y 13, 1886. Returnable " 18, 1886. J. D. Shafer, plaintiff's attorney. Suit brought for the recovery of money; amount claimed, $3,204.34, with interest from the first day of July, 1875, at the rate of 10 per cent. per annum, less the sum of $100.00 paid on Dec. 1, 1875, and for costs of suit, &c. J. D. Shafer, attorney for plaintiff.

5 I received this summons on the 13th day of February, A. D. 1886, at 2 o'clock p. m. of that day, and I served the same summons in my county of Leavenworth, Kansas, on the within-named defendant, J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, by delivering to him personally a true and certified copy of this summons, with all the endorsements hereon, this 13th day of Feb ruary, A. D. 1886.

LEVI CHURCHILL,
Sheriff of Leavenworth County, Kansas.

Fees	$0 75
Service	50
Copies	25

Filed this 13 day of Feb'y, A. D. 1886.

JOHN ROHR, *Clerk.*

In the District Court of Leavenworth County, in the State of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, as Administrator of the Estate of James G. Blunt, Deceased, Defendant.

Demurrer.

And now comes the defendant, J. P. Bauserman, as administrator of the estate of James G. Blunt, deceased, and demurs to the petition of said plaintiff filed herein, and for cause of demurrer alleges:

1. That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this said defendant, and that it appears by the said petition that the alleged cause of action therein stated is barred by the statute of limitations.

J. H. GILLPATRICK &
WM. GREEN,
Att'ys for Def't.

Endorsed: 9370. Elbridge G. Blunt *vs.* J. P. Bauserman,
6 as adm'r of Jas. G. Blunt, dec'd. Demurrer of defendant. Filed March 8, 1886. John Rohr, clerk. J. H. Gillpatrick & W. Green.

In the District Court of Leavenworth County, in the State of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, as Administrator of the Estate of James G. Blunt, Deceased, Defendant.

Petition for Removal to the Circuit Court of the United States for the District of Kansas.

To said hon. district court:

Your petitioner, the defendant above named, respectfully shows to this hon. court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner, the defendant herein, was at the time of the commencement of this suit and still is a citizen and resident of the State of Kansas, and that said plaintiff was and still is a citizen of the State of Illinois.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he asks this court to accept said bond and surety and
7 to order the removal of this cause and the record herein to the said circuit court of the United States for the district of Kansas.

J. H. GILLPATRICK &
W. GREEN,
Att'ys for Petitioner.

Endorsed: No. 9370. Elbridge G. Blunt *vs.* J. P. Bauserman, as adm'r, &c. Petition for removal to U. S. circuit court. Filed March 13, 1886. John Rohr, clerk, by Chas. Crouse, D. C. J. H. Gillpatrick & W. Green.

Know all men by these presents that *I*, J. P. Bauserman, as principal, and Charles N. Stevens, as surety, are held and firmly bound unto Elbridge G. Blunt in the penal sum of five hundred dollars; the payment of which, well and truly to be made, we bind ourselves, our heirs and representatives, firmly by these presents.

Yet upon these conditions: The said J. P. Bauserman, as administrator of the estate of James G. Blunt, deceased, having petitioned the district court of Leavenworth county, in the State of Kansas, for the removal of a certain cause therein pending, wherein Elbridge G. Blunt is plaintiff and said J. P. Bauserman, as administrator of the estate of James G. Blunt, deceased, is defendant, to the circuit court of the United States for the district of Kansas:

Now, if said J. P. Bauserman, as such administrator, your peti-

tioner, shall enter in said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and effect.

8 Witness our hands and seals this 13th day of March, 1886.

J. P. BAUSERMAN.
CHAS. N. STEVENS.

Endorsed: 9370. Elbridge G. Blunt *vs.* J. P. Bauserman, as adm'r, &c. Bond for removal to U. S. circuit court. Filed March 13, 1886. John Rohr, clerk, by Chas. Crouse, D. C.

UNITED STATES OF AMERICA:

Be it remembered that at the December term, A. D. 1885, of the district court of the first judicial district of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the city of Leavenworth, commencing on Monday, the seventh day of December, A. D. 1885—present, the Honorable Robert Crozier, judge; D. J. Keller, sheriff of Leavenworth county, Kansas, and John Rohr, clerk—the following proceedings were had, to wit:

SATURDAY, *March 13th, A. D.* 1886.

Court met pursuant to adjournment.

Present: Levi Churchill, sheriff; other officers as before.

ELBRIDGE G. BLUNT, Plaintiff, *against* J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant.	No. 9370.

This day came the plaintiff, by J. D. Shafer, his attorney, and also came the defendant, by J. H. Gillpatrick and Wm. Green, his attorneys, and thereupon the defendant presented to the court his petition and bond for the removal of this cause to the circuit court of the United States for the district of Kansas; which said bond is now by the court here accepted.

9 STATE OF KANSAS, } *ss:*
Leavenworth County, }

I, John Rohr, clerk of the district court of the first judicial district of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be a true, full, and complete copy of the transcript of the pleadings & record in the therein-entitled cause as the same remains on file & record in my office.

Witness my hand and the seal of said court, affixed at my office, in the city of Leavenworth, this the 5th day of June, A. D. 1886.

[SEAL.] JOHN ROHR, *Clerk.*

Endorsed: No. 5572. Transcript. Elbridge G. Blunt *vs.* J. P. Bauserman, adm'r of the estate of James G. Blunt, dec'd. Filed June 7, 1886. A. S. Thomas, clerk, by Frank H. Holt, deputy.

Statement of Costs.

Clerk, John Rohr	$3 10
Transcript, p'd by def't	2 25
Stenographer fee	2 00
Sh'ff, Levi Churchill	75
	8 10

10 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 7th day of June, A. D. 1886, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *June* 10, 1886.

ELBRIDGE G. BLUNT *vs.* J. P. BAUSERMAN, Adm'x, etc. } 5572.

Demurrer herein came on to be heard and was argued by counsel; on consideration whereof the court doth overrule said demurrer; to which ruling and decision of the court said defendant duly excepts. It is ordered by the court that the defendant have sixty days from this date to file answer.

11 THE UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

In the Circuit Court of the United States for the District of Kansas.

ELBRIDGE G. BLUNT, Plaintiff, *vs.* J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant. } Answer.

And now comes the said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, and for answer to the petition of the plaintiff herein denies each and every allegation and averment therein contained except such as are hereinafter specially admitted.

2. And, further answering, this defendant says that said James B. Blunt did not at any time within five years next after the accruing of the alleged cause of action set forth in the petition undertake or promise to the plaintiff in manner and form as plaintiff has averred in his said petition.

And defendant further says that the averments of plaintiff's petition to the effect that said James G. Blunt, deceased, was a resident

of the State of Kansas from the date of the alleged promissory note in suit, on the — day of ——, 187–, until his (said Blunt's) death in July, 1881, are true, and defendant avers that during all of said period the last and usual place of residence of said James G. Blunt, now deceased, was on lots one and two, in block thirty-one, of Clark & Rees' addition to the city of Leavenworth, in the State of Kansas, where during all that time his wife and family lived and had their domicil.

That said James G. Blunt's absence was never but tempo-
12 rary, and that when he absented himself from the State of Kansas it was with the intention of returning to his said home and residence.

That the house and residence of said Blunt, now deceased, aforesaid, is situated on said lots, and was during all the period named above occupied by his family or some member or members thereof, and never from the said date of the note sued on herein until said Blunt's death, in July, 1881, was closed, but was always open, so that process or any paper left there would have come to the hand of some member of the family in charge of the premises or a member of the household of said James G. Blunt, and that never during the time mentioned did said Blunt or his family reside or have a residence or domicile elsewhere than at and on the lots above named, the same being at the southwest corner of Sixth and Chestnut streets, in Leavenworth City, Kansas.

Wherefore defendant prays that he go hence without day and recover his costs.

J. H. GILLPATRICK & W. GREEN,
Att'ys for Defendant.

Endorsed: No. 5572. Elbridge G. Blunt *v.* J. P. Bauserman, adm'r, &c. Answer. Filed June 23, 1886. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Gillpatrick & W. Green.

13 In the Circuit Court of the United States for the District of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant.

And now comes the plaintiff, Elbridge G. Blunt, and for reply to the answer of the defendant in the above-entitled cause denies each and every allegation therein contained, except such matters as are admitted in this plaintiff's petition.

WALTERS & CHASE,
Att'ys for Plaintiff.

Endorsed: No. 5572. Elbridge G. Blunt *vs.* J. B. Bauserman, adm'r, etc. Reply. Filed Aug. 11, 1886. A. S. Thomas, clerk, by Frank H. Holt, deputy.

14 In the Circuit Court of the United States in and for the District of Kansas.

ELBRIDGE G. BLOUNT, Plaintiff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blount, Deceased, Defendant.

Reply.

The plaintiff for reply to the second defense of the answer of the defendant says—

That the plaintiff denies every allegation contained in said defense that is in any way antagonistic or contrary to the averments contained in the plaintiff's petition; and the plaintiff avers and charges to be true that the note sued on was executed by the said James G. Blount, since deceased, on the 1st day of July, 1875, and became due according to the tenor thereof one day after the date thereof; that the said James G. Blount died in July, 1881; that an administrator was first appointed on the 14th day of December, 1885; that this action was commenced on February 13th, 1886, and that the said James G. Blount during his lifetime, after the maturity of said note and prior to his death, was out of the State of Kansas and personally absent therefrom for the spaces and periods of time aggregating full five years, during which said periods of time he was not personally within the State of Kansas, nor could he be personally found or served therein; that the said James G. Blount during his lifetime, after the maturity of said note and prior to his death, became and was insane for the full space of five years, and continued to be so insane to the time of his death, during all which time no guardian, conservator, or other custodian of his person or estate was ever appointed for him or within the
15 State of Kansas, and that this action was instituted within one year from the appointment of an administrator of the estate of the said James G. Blount, deceased, and that the plaintiff is entitled to have and recover judgment against said defendant, as demanded in his petition.

J. L. PENDERY AND
WATERS & CHASE,
Att'ys for Plaintiff.

Endorsed: No. 5572. In the circuit court of the U. S., dist. of Kansas. Elbridge G. Blount, plaintiff, *vs.* J. P. Bauserman, adm'r, &c., defendant. Reply. Filed Sept. 28, 1886. A. S. Thomas, clerk, by Frank J. Thomas, deputy. J. L. Pendery and Waters & Chase, Topeka, Kansas, attorneys for plaintiff.

16 In vacation, September 28, 1886.

ELBRIDGE G. BLUNT
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased. } 5572.

It is ordered by the court that the defendant have leave to file reply herein.

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said District, on Monday, the 22nd day of November, A. D. 1886, proceedings were had and appear of record in words and figures following, to wit:

TUESDAY, *Nov.* 23, 1886.

ELBRIDGE G. BLUNT
vs.
J. P. BAUSERMAN, Administrator. } 5572.

Continued by consent.

17 At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 28th day of November, A. D. 1887, proceedings were had and appear of record in words and figures following, to wit:

TUESDAY, *Dec.* 8, 1887.

ELBRIDGE G. BLUNT
vs.
J. P. BAUSERMAN, Adm'r. } 5572.

Continued.

FRIDAY, *Dec.* 9, 1887.

ELBRIDGE G. BLUNT
vs.
J. P. BAUSERMAN, Administrator. } 5572.

It is ordered by the court that the order of continuance herein be and is now set aside, and case set for Monday, December 12, 1887; notice to be given to Gillpatrick & Green.

18 THE UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court of the U. S., District Aforesaid.

ELBRIDGE G. BLUNT, Pl'ff,
vs.
J. P. BAUSERMAN, Administrator, &c., Def't. }

And now comes the defendant and demurs to the reply of plaintiff to the answer of the defendant heretofore filed herein for the

reason that so far as the same seeks to avoid the plea of the statute of limitations does not set forth facts sufficient to constitute an exception to or an avoidance of the statute.

J. H. GILLPATRICK & W. GREEN,
Att'ys for Def't.

Endorsed: No. 5572. F. G. Blunt *vs.* J. P. Bauserman, adm'r, &c. Demurrer to reply of pl'ff. Filed Dec. 19, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy. J. H. Gillpatrick & W. Green, att'y- for def't.

In the Circuit Court of the United States for the District of Kansas.

ELBRIDGE G. BLUNT
v.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased.

Stipulation Waiving a Jury.

The parties to this action hereby waive the intervention of a jury and agree that this action may be tried by the court.

J. L. PENDERY AND WATERS & CHASE,
Attorneys for Plaintiff.

The foregoing agreed to with the understanding that the circuit judge shall sit in the trial of the case as heretofore when the same was heard on demurrer.

W. GREEN & J. H. GILLPATRICK,
Att'ys for Defendant.

Endorsed: Filed June 9, 1888. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

19 At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 26th day of November, A. D. 1888, proceedings were had and appear of record in words and figures following, to wit:

MONDAY, *Nov.* 26, 1888.

ELBRIDGE G. BLUNT
vs.
J. P. BAUSERMAN, Administrator of the Estate of James P. Blunt, Deceased. } 5572.

Now comes the plaintiff herein, by J. L. Pendery and Waters & Chase, his attorneys, and also comes the defendant herein, by W. Green and J. H. Gillpatrick, his attorneys, and thereupon this action came on for trial, and the parties hereto, by their attorneys, waive a jury by written stipulation filed herein and submit the premises to the court; and thereupon the court, having heard the evi-

dence adduced and arguments of counsel, now find for the plaintiff and assess his damages against said defendant herein at the sum of $7,396.02; to which finding and decision of the court said defendant duly excepts.

And thereupon it is by the court here considered, ordered, and adjudged that said plaintiff herein, Elbridge G. Blunt, have and recover of and from said defendant herein, J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, the sum of seven thousand three hundred ninety-six and $\frac{2}{100}$ dollars, with interest at the rate of 10 per cent. per annum from this date, and also his costs in this action expended, and that execution issue therefor; to which judgment and decision of the court said defendant duly excepts.

20 In the Circuit Court of the United States for the District of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, as Administrator of the Estate of Jas. G. Blunt, Deceased, Defendant. } No. 5572.

Motion for a New Trial.

Now comes the defendant above-named and moves the court to set aside the finding and decision of the court made in this action and to grant a new trial herein for the following reasons, which materially affect the substantial rights of the defendant, to wit:

1st. That said finding and decision of the court is contrary to law and is not sustained by the evidence.

2d. Error of law occurring at the trial and excepted to by the defendant.

3d. That the finding and decision of the court was in favor of the plaintiff, when it should have been for the defendant.

J. H. GILLPATRICK & W. GREEN,
Attorneys for Defendant.

Endorsed: No. 5572. Elbridge G. Blunt *v.* J. P. Bauserman, adm'r, &c. Defendant's motion for a new trial. Filed Nov. 26, 1888. Geo. F. Sharitt, clerk. Gillpatrick & Green, for defendant.

21 In the Circuit Court of the United States, District of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant.

To the defendant and his attorneys of record:

You will take notice that we hereby claim and file an attorney's lien on the judgment rendered herein for the sum of twenty-five

hundred ($2,500.00) dollars for services rendered in said cause as attorneys for the plaintiff.

WATERS, CHASE & TILLOTSON,
Attorneys for Plaintiff.

Endorsed: No. 5572. In the circuit court of the United States for the district of Kansas. Elbridge G. Blunt, plaintiff, *vs.* J. P. Bauserman, administrator of estate of James G. Blunt, deceased, defendant. Attorney's lien. Filed Feb. 7, 1889. Geo. F. Sharitt, clerk. Waters, Chase & Tillotson, att'ys for plaintiff.

22 MONDAY, *Feb'y* 11, 1889.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant. } 5572.

On this February 11, 1889, came on to be heard the motion of defendant for new trial of this action, and the court, having heard the arguments of counsel thereon and being fully advised in the premises, now overrules said motion; to which ruling and judgment of the court said defendant duly excepts.

DAVID J. BREWER,
Circuit Judge.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant. } 5572.

Now comes the defendant and presents to the court his bill of exceptions, and the same is allowed and signed and ordered to be placed on file with the pleadings and made a part of the record in this case.

23 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

In the Circuit Court of the United States for the District of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, as Administrator of the Estate of James G. Blunt, Deceased, Defendant.

Defendant's Bill of Exceptions.

Be it remembered that on the trial of this cause at the November term, A. D. 1888, of the circuit court of the United States for the dist. of Kansas, begun and held at Topeka, and on Monday, the 26th day of November, A. D. 1888, the said plaintiff and defendant submitted this action to the court for hearing and decision upon the following facts and evidence below given, to wit:

First. That this is an action on a promissory note for $3,204.34, given by defendant's intestate, General James G. Blunt, to the plaintiff on the first day of July, 1875, due in one day after date, bearing ten per cent. interest from date & with a credit of one hundred dollars paid on Dec. 1, 1875.

Second. That said James G. Blunt died intestate on July 25th, 1881, and that said J. P. Bauserman was duly appointed and qualified as administrator of his estate on the 14th day of December, 1885, by the probate court of Leavenworth county, Kansas, and this action was commenced on the 13th day of February, 1886.

Third. That the debtor, said James G. Blunt, had kept and maintained his usual place of residence and home in Leavenworth city, Kansas, which, during all the time from the making of said note to said debtor's death, in July, 1881, and for many years prior
24 thereto, was continuously open and occupied by the wife and children, the family of the debtor, and where service of a summons could have been made upon said debtor by leaving at such residence a copy of such summons.

Fourth. That said debtor, in person, was temporarily absent from Kansas on business at different periods from 1875 to his death, in 1881, more than enough time to take this case out of the statute of limitations of Kansas if the personal presence in the State of Kansas be necessary for the statute to run.

Thereupon the plaintiff offered and read in evidence, to maintain the issues on his part, the following depositions:

25 *Notice to Take Depositions in U. S. Courts.*

(U. S. Stat., 2d session 42d Congress, chap. CXLVI, p. 89.)

UNITED STATES OF AMERICA, *District of Kansas*, } ss:

In the Circuit Court of the United States for the District of Kansas.

ELBRIDGE G. BLUNT, Plaintiff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of Jas. G. Blunt, Defendant. } Term No., 202.

You, the above-named defendant, and J. H. Gilpatrick and William Green, your attorney- of record, are hereby notified that on Saturday, the 31st day of December, A. D. 1887, the above-named plaintiff, Elbridge G. Blunt, will, in the above-entitled suit, at the law office of L. G. Cummings, No. 226 La Salle street, Chicago, in the county of Cook, in the city of Chicago, Illinois State, take depositions of the plaintiff, Elbridge G. Blunt, to be used as evidence on the trial of said suit and on the hearing of each and every motion and application therein, and that the taking of said depositions will commence at nine o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sun-

days excepted, at the same place until the taking of the same is completed.

Dated this 22d day of December, A. D. 1887.

WATERS & CHASE,
Attorneys for Plaintiff.

Exhibit A.

This notice was served on us this 22d day of December, A. D. 1887, by delivery of a duplicate of the same to Mr. J. P. Bauserman, administrator of estate of Jas. G. Blunt, deceased.

——— ———,
Attorney for Defendant.

26 The deposition of Elbridge G. Blunt, of the county of Cook, and State of Illinois, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the 31st day of December, in the year of our Lord one thousand eight hundred and eighty-seven, at the office of L. F. Cummings, No. 226 La Salle street, in the city of Chicago, in the county of Cook and State of Illinois aforesaid, by me, Henry A. Cravener, a notary public, by authority of a notice hereto attached and marked Exhibit "A" for the examination of the said Elbridge G. Blunt, a witness in a certain suit and controversy now pending and undetermined before the circuit court of the United States for the district of Kansas, wherein Elbridge G. Blunt is plaintiff and J. P. Bauserman, administrator of the estate of James G. Blunt, is defendant, in behalf of the said plaintiff upon oral interrogatories propounded by L. F. Cummings, Esq., of counsel for the said plaintiff, no one appearing for defendant.

The said ELBRIDGE G. BLUNT, being first duly sworn by me as a witness in said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiff as the defendant in relation to the matters in controversy between the said plaintiff and defendant so far as he should be interrogated, testified and deposed as follows:

(Convened at 2 p. m., having adjourned from 9 a. m.

Present: Elbridge G. Blunt and L. F. Cummings, his counsel, no one appearing for def't.)

Interrogatory 1st. State your name, age, residence, and place of occupation.

Ans. to 1st Int. My name is Elbridge G. Blunt; age, sixty-three; my place of residence is Chicago, Illinois; occupation, engineer in public school, Chicago, and am paid $85.00 per month, and support my family on this & pay house rent.

27 Int. 2nd. Are you the plaintiff in this case, wherein Elbridge G. Blunt is plaintiff and J. P. Bauserman, administrator, is defendant?

Ans. 2nd. I am; yes.

Int. 3rd. Do you know James G. Blunt, the party that is named

in this paper entitled "Notice to take depositions" (showing witness notice hereto attached, marked Exhibit "A")?

Ans. 3rd. Yes.

Int. 4th. How long have you known him?

Ans. 4th. Ever since I can remember anything.

Int. 5th. What relation was he, if any, to you?

Ans. to 5th. A brother.

Int. 6th. Was James G. Blunt, your brother, or was he not owing you at the time of his decease? And, if so, state fully the amount of the indebtedness, the consideration for it, & whether you ever received any written evidence of this indebtedness.

Ans. to 6th. He was owing me at the time of his decease. He owed me thirty-two hundred & four dollars and thirty-four cents ($3,204.32). I worked for him from the fall of 1868 to the fall of 1874. I was superintendent of two lime-kilns and stone quarries, working in the stone quarry, shoveling lime, and canvassing for trade. I received a note.

Int. 7th. Please state if this paper shown you is a copy of the note you refer to.

Ans. 7th. Yes.

Counsel introduces paper marked Exhibit B, just testified to by witness as being a true copy of note.

Int. 8th. What time did your brother die, if you know?

Ans. to 8th. I think it was in 1881.

28 Int. 9th. You stated that your brother was owing you at his decease $3,204.34, evidenced by a note, and a copy introduced bears date July 1, 1875, and it is stated in the copy with interest at the rate of ten per cent. per annum. Is it or is it not a fact that, at the time of your brother's decease, in addition to the amount you stated he was owing, he was not also owing the interest on that from the date thereof?

Ans. to 9th. He was owing all the interest excepting one hundred dollars, which is endorsed on the note and was endorsed at the time it was paid.

Int. 10th. Do you know where your brother resided from July 1, 1875, to the time of his decease?

Ans. to 10th. I know where he was most of the time.

Int. 11. State where he was, so far as you know, during that time.

Ans. to 11th. In Washington, D. C.

Int. 12th. Where was he when he gave you the note referred to?

Ans. to 12th. In Chicago, Illinois, at my own house. We looked over all the old books of account at that time. It was a long running account for money I had paid out, for back salary, and for work I had performed. We had a full settlement at that time and he gave me his note.

Int. 13th. When you went to work for your brother and afterwards, while carrying on his business, did you have means of your own outside of your salary or wages?

Ans. to 13th. I sold my property in Kansas for twenty-five hun-

dred dollars cash. I had about $2,000.00 of that when I landed in Chicago and commenced work for my brother. I advanced most of this money to my brother to help carry on his business and was credited on the books for the same. I took of my salary only what was necessary for the expenses of my family.

29 Int. 14th. In the fall of 1874, when you ceased to do work for your brother, had you any means whatever?

Ans. to 14th. No; I had none of any account; devilish little; about $50.00. I don't think I had that amount; I was hard up.

Int. 15th. And you had drawn or used no means for any purpose excepting for the bare support of your family?

Ans. to 15th. That was all.

Interrog. 16th. State, if you know, if your brother at any time after the giving of this note referred to was absent from the State of Illinois.

Ans. He was absent the greater part of the time, to the best of my knowledge.

Int. 17th. How soon after the giving of this note did he leave Illinois?

Ans. to 17th. He left a few days after.

Int. 18th. Where did he go?

Ans. to 18th. He told me he was going to Washington, D. C.

Int. 19th. Have you any means of knowing whether or not he went to Washington?

Ans. to 19th. I received letters frequently from him dated & postmarked at Washington.

Inter. 20th. Have you those letters?

Ans. to 20th. I have some of them; the rest are lost or destroyed; I have a very few of them.

Int. 21st. Can you produce those letters and envelopes in which they were contained?

Ans. to 21st. Yes; those of them that I have.

Int. 22nd. ——.

30 Counsel here shows witness five letters and an envelope and asks witness if those are the letters that he has stated he received from his brother while at Washington, D. C.

Ans. to 22nd. A portion of them, the others being lost or destroyed.

Int. 23rd. Are these five letters and envelope the portion that were not destroyed referred to?

Ans. to 23rd. They are.

Counsel here offers in evidence a letter dated Washington, D. C., January 1, 1877, signed James G. Blunt; a letter dated Washington, Feb'y 14, 1876, and signed James G. Blunt; a letter dated Washington, D. C., Feb'y 23rd, 1877, signed J. G. B.; a letter dated Washington, D. C., Dec. 20, 1878, and signed James G. Blunt; a letter dated Wash., Jan'y 5, 1879, signed J. G. B.; an envelope, postmarked at Washington in February, addressed E. G. Blunt, 241 S. Hoyne St., Chicago, Ill. These letters and envelopes counsel introduces in evidence. They are marked Exhibits C, D, E, F, G, and H.

Int. 24th. Do you know in whose handwriting all of those letters are and the writing in ink on the envelope?

Ans. to 24th. I do.

Int. 25th. In whose are they?

Ans. to 25th. Yes; my brother's.

Int. 26th. How did you receive them?

Ans. to 26th. Through the mail—delivered by letter-carrier.

Int. 27th. State, to the best of your knowledge, how often you received letters from your brother dated and postmarked at Washington, D. C., from the first of July, 1875, to the time of his decease.

Ans. to 27th. Sometimes I got them very often & sometimes more than a month would elapse between receiving them.

Int. 28th. ——.

31 Counsel here shows witness a letter, dated Government Hospital for the Insane, near Washington, D. C., Sept. 4, 1879, addressed to E. G. Blunt, Esq., and signed W. W. Godding, superintendent, and asks witness if he received the letter; and, if so, how.

Ans. to 28th. Yes; I received it through the mail. It was in answer to mine which I sent to Godding, sup't, after I was informed that my brother had been confined in the insane asylum, asking him if it would be proper for me to communicate by letter with my brother.

Counsel here introduces a letter and envelope, each marked Exhibits "I."

Int. 29th. Please state how long it was before the date of this letter, Ex. I, that you learned that your brother was believed to be insane and had been confined as an insane person.

Ans. to 29th. Somewhere in the neighborhood of six months before.

Int. 30th. What hospital was he confined in?

Ans. to 30th. The Government insane asylum near Washington, D. C.

Int. 31st. How long was he there?

Ans. to 31st. He staid there until he died—in the hospital.

Int. 32nd. What was the condition of his mind when he went to Washington in 1875?

Ans. to 32nd. Well, there was nothing wrong with him, as far as I know. I didn't mistrust anything, and no one else did that I ever heard of.

Int. 33rd. When was the last time you saw him?

Ans. — 33rd. In the fall of 1878 he was passing through Chicago on his way to Washington.

Int. 34th. What was the condition of his mind then?

Ans. to 34th. I asked him in regard to his health and he
32 replied, "I never felt better in my life," and I mistrusted nothing as to his mind and he appeared as sound as he ever did in his life.

Int. 35th. Do you know of anything further that you desire to state and deem pertinent to this case?

Ans. to 35th. No; I do not.

ELBRIDGE G. BLUNT.

Subscribed and sworn to before me this 31st day of December, A. D. 1887.

[SEAL.] HENRY A. CRAVENER.
Notary Public.

I, Henry A. Cravener, of the county of Cook and State of Illinois, a notary public, duly appointed to take the deposition of the said Elbridge G. Blunt, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Elbridge G. Blunt as a witness in the suit between the said Elbridge G. Blunt, plaintiff, and the said J. P. Bauserman, administrator, defendant,— so far as he should be interrogated concerning the same; that the said deposition was taken at the office of L. F. Cummings, Esq., No. 226 La Salle street, Chicago, in the county of Cook and State of Illinois, on the 31st day of December, A. D. 1887; that the said Elbridge G. Blunt and L. F. Cummings, his counsel, were present at nine o'clock a. m. and adjourned the taking of said deposition until two o'clock p. m. of the same day, no one appearing for said defendant, and that at the hour last named, after said deposition was taken by me as aforesaid, the interrogatories and answers thereto as written down were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent, Elbridge G. Blunt,
33 before me, the oath being administered by me as such notary public, at the place and on the day and year last aforesaid, and that said deposition was retained by me until sealed up and directed to the clerk of the circuit court of the United States for the district of Kansas, at Leavenworth, Kansas, wherein said suit is now pending.

[SEAL.] HENRY A. CRAVENER,
Notary Public.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Wulff, clerk of the county court of Cook county, the same being a court of record, do hereby certify that Henry A. Cravener, Esq., whose name is subscribed to the certificate to the annexed deposition, was, at the time of signing the same, a notary public in and for Cook county, duly commissioned, sworn, and acting as such, and authorized to administer oaths and take depositions; that I am well acquainted with his handwriting and I verily believe that the signature to the said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Chicago, in the said county, this 3rd day of January, 1888.

[SEAL.] HENRY WULFF, *Clerk.*

CHICAGO, ILL., *Dec.* 31, 1887.

E. G. Blunt, Esq., to Henry A. Cravener, Dr.

To taking deposition of Elbridge G. Blunt and mailing same... $4 25
Rec'd payment.,

HENRY A. CRAVENER,
Notary Public.

34 $3,204.34. CHICAGO, ILL., *July 1st*, 1875.

One day after date I promise to pay to E. G. Blunt or order thirty-two hundred & four & $\frac{34}{100}$ dollars at ——, with interest at the rate of ten per cent. per annum, value received.

Hereby waiving and releasing any and all rights under — by virtue of all laws of the State of Illinois exempting real or personal property from execution, writ of attachment, and sale for the payment of debts.

No. —. Due ——.

JAS. G. BLUNT.

Endorsed: E. G. Blunt. Dec. 1st, 1873, rec'd on the within note one hundred dollars.

EXHIBIT C.

WASHINGTON, D. C., *Jan'y 1st*, 1877.

DEAR BROTHER: Yours of the 28th ult. received. I have written to Mr. Whipple to-day to do the best he can for you in the way of money matters, and that if he cannot pay you all of the $125 draft at once to pay it in installments so as to meet your wants for current expenses. It has been remarkably quiet here for the last ten days, but the menagerie will open again to-morrow and the animals will begin to convort. It now looks as though it is a settled thing that Tilden and Wheeler will be inaugurated, and as soon as a programme is settled for counting the vote and declaring the result, which promises to be done very soon, Congress will then do some business.

We have had winter here in earnest, continued cold weather and sleighing for the last ten days, and now it is snowing fear-
35 fully and a depth of 10 inches on the level has already fallen, something very unusual for this locality.

I wish you all a happy New Year's.

Yours truly, JAS. G. BLUNT.

EX. D.

UNITED STATES SENATE CHAMBER,
WASHINGTON, *Feb.* 14, 1876.

DEAR BROTHER: Yours of recent date was received a few days ago. I am daily expecting some money, and as soon as I get hold of it I will assist you; it was due on the 10th and the party wrote me on the 3rd that he would have it here by time it was due if not before; if I do not hear from him in a few days I shall write and

stir him up. I only had a dollar and fifty cents in my clothes when I got here, and have been depending upon the money above referred to, and now, like the fellow digging for the ground hog, I must have it.

The prospect in matters in which I am interested look well at present, and I think I will get away with some baggage besides getting other enterprises in good shape for the future. "North Caroline Cherokee" matters are in good shape, and the investigation of that matter is under my control and I have not yet determined what course I pursue but will try and do that which will be most advantageous. I am now working up a matter on Smith & Delano, which, in addition to being an infameus transaction, is also a little spicy; it is in reference to a medicine transaction for Indians. I think I will be ready to put them on the gridiron next Wednesday (day after to-morrow), and have arranged to have a large number of newspaper correspondents present in the committee room
36 (committee of Indian affairs) during the examination of witnesses, and you will see the thing well dished up in the papers, especially the Chicago Times. I will write you again as soon as I get some money.

Yours truly, JAS. G. BLUNT.

EXHIBIT E.

WASHINGTON, D. C., *Feb.* 23*d*, 1877.

DEAR BROTHER: Yours of the 17th inst. received. I can write you nothing definite in reference to money matters until after the adjournment of Congress. I have no money at my command now; if I had you should have it. The money I arranged for Whipple to pay was not money that he owed me but money I was to get of him as an accommodation, & which arrangement he would have carried out if he had not been disappointed when he supposed—and had good cause to suppose—he was certain to get money. The same arrangement also included the furnishing of funds for expenses here this winter, but in consequence of his failure to connect and consequent inability to carry out the arrangement I have been without money for current expenses ever since I have been here. As soon as I know anything definite as to my future prospects for money I will write you.

Yours truly, J. G. B.

EXHIBIT F.

UNITED STATES SENATE CHAMBER,
WASHINGTON, *Dec.* 20*th*, 1878.

DEAR BROTHER: Enclosed herewith I send you note to Hamer. I have also written him a private letter.
37 I wish you would write to Uncle Thomas Blunt and learn if he knows the date of father's birth. I wrote to Aunt Betsey for the information, but she cannot give it. If Uncle Thomas does not know, perhaps Uncle Joseph does. I do not know his ad-

dress in Mass.; perhaps Uncle Thomas can give it to me & I will write him. I would write direct to Uncle Thomas if I knew his address. We are preparing a monument for father and Cynthia, which is now about completed, and want the date of father's birth for inscription. I hope I may be able to send you some money soon. The Comptroller in Treas'y Dep't has promised to take up and dispose of a matter in which I am interested by the first of January. If he does so the money will probably get around by the middle of Feb. I suppose you have heard of the death of Aunt Libby, which occurred about 2 weeks ago. Just before her death she appeared better than at any time since the first commencement of her malady. Phebe went to her room, as she usually did, to take her breakfast and found her dead, and looking as perfectly natural as though sleeping. It was evidently a sudden paralysis of the heart. James Putman has lost his wife and son—a very likely young man of 22 years age—within the last 6 weeks.

Yours truly, JAS. G. BLUNT.

EXHIBIT G.

WASH., *Jan'y 5th*, 1879.

DEAR BROTHER: Yours received. The date of father's birth, which you mention, is quite near enough. I did not expect that the employment that Hamer would give you would be on the road, but in shops in Chicago, and that probably no place could probably be found at present that will afford large wages, but the employ-
38 ment will be permanent and soon something better may turn up. I think — arrangement will be better than nothing. My principle has ever been that "half a loaf is better than no bread." We have been having some pretty cold weather here lately; 10 below tem'e, as an old fellow in Dark Co. us- to say.

I see that you have been having some pretty tough weather in Chicago. We have had no snow here yet. There has been 2 feet in depth in Leavenworth.

Yours truly, J. G. B.

EXHIBIT H.

Envelope endorsed:

HOUSE OF REPRESENTATIVES, U. S.

E. G. BLUNT,
241 *Hoyne St., Chicago, Ill.*

Washington, D. C., Feb. 23, 7 p. m.
Chicago, Ill., Feb. 26, 11 a m., carrier.

EXHIBIT I.

W. W. Godding, M. D., sup't.

GOVERNMENT HOSPITAL FOR THE INSANE,
NEAR WASHINGTON, D. C., *September 4th*, 1879.

E. G. Blunt, Esq., No. 309 So. Hoyne St., Chicago, Ills.

DEAR SIR: I have to acknowledge the receipt of your note of the 31st ult., in relation to the case of your brother, General James G. Blunt.

The General continues to enjoy good bodily health, but there has been no decided improvement in his mental condition since he was last visited by Col. Gilpatrick, his son-in-law.

It will be entirely proper for you to write to Gen'l Blunt and I shall endeavor to induce him to answer your letter. He has frequently been urged to communicate with his friends, whose letters lie unanswered, but often without avail.

39 An indisposition to exertion, either mental or physical, has been a marked feature in the case.

Very respectfully, W. W. GODDING,
Superintendent.

EXHIBIT I.

DEPARTMENT OF
GOV'T HOSPITAL FOR INSANE.

Official business.

Any person using this envelope to avoid the payment of postage on private matter of any kind will be subject to a fine of three hundred dollars.

Washington, D. C.,
1879, Sept. 4, 8 p. m.

E. G. BLUNT, Esq.,
309 *Hoyne Street, Chicago, Ills.*

[Stamped on back of envelope:] Chicago, Ill., 6 Sep., 9 a. m. Carrier.

Opened at the instance and request of J. L. Pendery, att'y for pl'ff, Jan. 9, 1888.

A. S. THOMAS, *Clerk.*

No. 5572.
Filed Jan. 5, 1888.

40 & the following laws of the State of Kansas, to wit;

First. Section 18 of article 3 of chapter 80 of said laws which reads as follows:

"SEC. 18. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First. Within five years; an action upon any agreement, contract or promise in writing.

Second * *."

Second. Section 21 of article 3 of said chapter 80 of said laws, which reads as follows:

"SEC. 21. If, when a cause of action accrues against a person, he be out of the State, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the State, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the State, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

Also the decisions of the Supreme Court in the cases of Lane *vs.* The Bank, 6 Kansas, 75; Bonifant *vs.* Walker, 3 Kan., 26; Hoggett *vs.* Emerson, 8 Kan., 262, & Morrell *vs.* Ingle, 23 Kan., 32.

The defendant to maintain the issues on his part offered and read in evidence the following laws of the State of Kansas, to wit;

First. Sec. 64 of article 6 of chapter 80 of said laws, which reads as follows:

"SEC. 64. The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day."

41 Second. Section 12 of article 1 of chapter 37 of said laws, which reads as follows:

"SEC. 12. Administration of the estate of an intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled thereto in the following order, to wit:

First. His widow, or next of kin, or both, as the court may think proper; and if they do not voluntarily either take or renounce the administration within thirty days after the death of the intestate, they shall, if resident within the county, upon application of any one interested, be cited by the court or judge for that purpose.

Second. If the persons so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect, for twenty days after service of said citation, without any sufficient cause, to take administration of the estate, the court shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust.

Third. If there be no such creditors, and the court is satisfied that the estate exceeds the value of one hundred dollars, the court shall commit administration to such other persons as it shall deem proper."

Whereupon the court, being of opinion that the personal absence of the debtor from the State of Kansas, notwithstanding his residence in the State where service of a summons could be made on him, was sufficient to prevent the bar of the statute of limitation, and that the statute of limitation was suspended from the debtor's death until the appointment of his administrator, gave judg-

42 ment for the plaintiff for $7,396.02, with ten per cent. interest per annum from the date of the judgment.

Whereupon the said defendant made his exception to the said opinion and finding of the court.

And the said defendant moved the said court thereupon for a new trial of this action by reason of the said finding and judgment being against the law of the case, and also by reason of the said finding and judgment being against the evidence, and by reason of error of law occurring at the trial and excepted to at the time by the defendant.

But the court overruled the said motion for a new trial and gave judgment against the defendant.

Whereupon the defendant, by his counsel, made his exceptions to the said opinion and judgment of the court in that behalf, and prayed that the court would sign and seal this bill of exceptions and make the same a part of the record in this case; which is accordingly done.

Feb'y 11th, 1889.

DAVID J. BREWER,
Circuit Judge.

Endorsed: No. 5572. Elbridge G. Blunt *vs.* J. P. Bauserman, as adm'r, &c. Bill of exceptions of defendant. Filed Feb. 11, 1889. Geo. F. Sharitt, clerk.

43 (Copy.)

UNITED STATES OF AMERICA, *District of Kansas.*

In the Circuit Court Sitting in and for said District.

ELBRIDGE G. BLUNT, Pl'ff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant.

Notice to Messrs. Waters & Chase, Topeka, Kansas.

You and each of you are hereby notified that your services as att'ys in the above-entitled cause are no longer required.

J. L. PENDERY,
Att'y for Pl'ff.

To Messrs. Waters & Chase.
Feb'y 15th, 1889.

A true copy of the original now in my possession.
W. C. JONES, *U. S. M.*,
By CHAS. CURRIER, *Deputy.*

Service accepted.
Feb'y 16th, '89.

J. G. WATERS.

(Copy.)

UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court Sitting in and for said District.

ELBRIDGE G. BLUNT, Pl't'ff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant.
} Notice to Messrs. Waters & Chase, Topeka, Kansas.

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44

J. L. PENDERY,
Att'y for Pl'ff.

To Messrs. Waters & Chase.
Feb'y 15th, 1889.

A true copy of the original notice now in my possession.
W. C. JONES, *U. S. M.*,
By CHAS. CURRIER, *Deputy.*

Service accepted.

GEO. S. CHASE.

Feb'y 16, 1889.

UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court Sitting in and for said District.

ELDRIDGE G. BLUNT, Pl'ff,
vs.
J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Defendant.
} Notice to Messrs. Waters & Chase, Topeka, Kansas.

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J. L. PENDERY,
Att'y for Pl'ff.

To Messrs. Waters & Chase, Topeka.
Feb'y 15th, 1889.

No. 5572.

Notice. United States Marshal's Return.

STATE & DISTRICT OF KANSAS, *ss:*

I hereby certify that I served the within notice, at Topeka, Shawnee county, said State and district, on the within-named Waters & Chase, on the 16th day of February, A. D. 1889, by presenting to them a certified copy of said notice and obtaining their individual

acceptance thereof, as will more fully appear by reference to said copies hereto annexed and made part of this return.

W. C. JONES, *U. S. M.*,
By CHAS. CURRIER, *Deputy.*

Fees, $4.00.

Filed Feb. 16, 1889.

GEO. F. SHARITT, *Clerk.*

45 In United States Circuit Court for District of Kansas. Term No., 202.

ELBRIDGE G. BLUNT
vs.
J. P. BAUSERMAN, Administrator of Est. of Jas. G. Blunt. } No. 5572.

Filed Jan. 5, 1888.

A. S. THOMAS, *Clerk*,
By FRANK H. HOLT, *Deputy.*

Chicago, Ill., Jan. 3. Stamps.

To Clerk U. S. Circuit Court
for District of Kansas,
Leavenworth,
Kansas.

[Written on back of envelope:] Henry A. Cravener. Henry A. Cravener, notary public. Henry A. Cravener.

Leavenworth, Kas., Jan. —.

46 Know all men by these presents that we, J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, of Leavenworth, Kansas, and S. H. Holmes and B. S. Richards, of Leavenworth, Kansas, are held and firmly bound unto Elbridge G. Blunt in the just and full sum of two hundred and fifty dollars, to be paid to the said Elbridge G. Blunt, his executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 11th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, above named, hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered against him, administrator as aforesaid, in the circuit court of the United States for the district of Kansas, at the November term thereof, A. D. 1888, in favor of said Elbridge G. Blunt:

Now, therefore, the condition of this obligation is such that if J. P. Bauserman, administrator of the estate of James G. Blunt, de-

ceased, above named, shall prosecute his said writ of error to effect and answer and pay all costs if he fail to make his plea good, then this the above obligation to be void; otherwise to remain in full force and virtue.

J. P. BAUSERMAN, [SEAL.]
Administrator of Estate of Jas. G. Blunt, Dec'd. [SEAL.]
S. H. HOLMES. [SEAL.]
B. S. RICHARDS. [SEAL.]

47 I, the undersigned, one of the judges of the circuit court of the United States for the district of Kansas, have taken and approved the above bond and the sureties thereto.

Dated this 11th day of September, A. D. 1889.

DAVID J. BREWER,
Circuit Judge.

I hereby certify that the sureties who have executed the above bonds are sufficient security for the purpose and amount thereof, and that said bond is an ample bond for the amount named, to wit, $250.00.

September 11th, 1889.

DAVID J. BREWER,
Circuit Judge.

Endorsed: No. 5572. Elbridge G. Blunt *vs.* J. P. Bauserman, administrator of the estate of James G. Blunt, deceased. Bond. Filed Sept. 11, 1889. Geo. F. Sharitt, clerk.

48 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings had in said court in the case of Elbridge G. Blunt *vs.* J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, No. 5572, as the same remains of record and on file in my office.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 11th day of Sept., A. D. 1889.

GEO. F. SHARITT, *Clerk.*

49 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, October Term, A. D. 1889.

J. P. BAUSERMAN, Administrator of the Estate of James G. Blunt, Deceased, Plaintiff in Error,
vs.
ELBRIDGE G. BLUNT, Defendant in Error. } In Error.

And now comes said J. P. Bauserman, administrator of the estate

of James G. Blunt, deceased, the plaintiff in error herein, by L. B. Wheat, his attorney, and says that in the record and proceedings aforesaid—that is, in the record and proceedings mentioned in the writ of error herein—there is manifest error in this, to wit: First, that the petition aforesaid and the matters therein contained are not sufficient in law for the said Elbridge G. Blunt to have or maintain his aforesaid action thereof against said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased; second, there is also error in the said record and proceedings in this, to wit, that by the record aforesaid it appears that the findings and judgment aforesaid given *was* given for the said Elbridge G. Blunt
50 against the said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, whereas by the law of the land the said findings and judgment ought to have been given for the said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased.

And said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that the findings aforesaid be vacated and set aside and a new trial of the action aforesaid be granted, and that said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, may be restored to all things which said Bauserman, administrator as aforesaid, hath lost by occasion of said judgment, &c.

L. B. WHEAT,
Attorney for Plaintiff in Error.

51 [Endorsed:] J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, plaintiff in error, *vs.* Elbridge G. Blunt, defendant in error. Kansas C. C. U. S. Assignment of errors. Filed this 11th day of September, A. D. 1889, for transmission to the U. S. Supreme Court. Geo. F. Sharitt, clerk. L. B. Wheat, of Leavenworth City, Kansas, attorney for plaintiff in error.

52 THE UNITED STATES OF AMERICA, *ss*:

To Elbridge G. Blunt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, one of the judges of the circuit court of the United States for the district of Kansas, this 11th day of September, A. D. 1889.

DAVID J. BREWER,
Circuit Judge.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, the undersigned, Samuel E. Wheat, being first duly sworn, do on oath depose and say that I did, at Leavenworth, in the above-named district of Kansas, on the 11th day of September, A. D. 1889,
53 serve the within and foregoing citation on J. L. Pendery, one of the attorneys of record of the — Elbridge B. Blunt, in said citation mentioned, in the action in which the judgment therein mentioned was rendered, by then and there delivering to him, the said J. L. Pendery, personally, as such attorney, a copy of said citation; which service I so made for and on behalf of J. P. Bauserman, administrator of the estate of James G. Blunt, deceased.

SAMUEL E. WHEAT.

Subscribed in my presence and sworn to before me, the undersigned, a notary public in and for the county of Leavenworth, in the State of Kansas, this 11th day of September, A. D. 1889.

In witness whereof I hereto set my hand and affix my notarial seal the day and year last aforesaid.

My commission expires the 27th day of July, A. D. 1893.

JOHN W. HAUSSERMANN,
Notary Public.

[Seal John W. Haussermann, Notary Public, Leavenworth Co., Kas.]

54 [Endorsed:] No. 5572. Elbridge G. Blunt *vs.* J. P. Bauserman, administrator of the estate of James G. Blunt, deceased. Citation. Filed this 11th day of September, A. D. 1889, for transmission to the U. S. Supreme Court. Geo. F. Sharitt, clerk.

55 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Elbridge G. Blunt and J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, a manifest error hath happened, to the great damage of the said J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being
56 inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 11th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Issued at the office of the clerk of said circuit court, at Topeka, in said district.

In testimony whereof the said clerk hereto sets his hand and affixes the seal of said circuit court the day and year last above written.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT, *Clerk.*

Allowed by the Hon. David J. Brewer, one of the judges of the circuit court of the United States for the district of Kansas, this 11th day of September, A. D. 1889.

DAVID J. BREWER,
Circuit Judge.

57 [Endorsed:] No. 5572. Elbridge G. Blunt *vs.* J. P. Bauserman, administrator of the estate of James G. Blunt, deceased. Writ of error. Filed this 11th day of September, A. D. 1889, for transmission to the U. S. Supreme Court. Geo. F. Sharitt, clerk.

58 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

I, the undersigned, George F. Sharitt, clerk of the circuit court of the United States in and for the district of Kansas, do hereby certify that the above and foregoing transcript of the record in said court of the suit of Elbridge G. Blunt against J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, No. 5572, is by me now returned to the Supreme Court of the United States with and in obedience to the above and foregoing writ of error and citation, together with the above and foregoing assignment of errors, and a true, full, and correct copy of the bond in error for costs.

In witness whereof I hereto set my hand and affix the seal of said circuit court, at my office in Topeka, in said district, this 16th day of September, A. D. 1889.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT, *Clerk.*

Endorsed on cover: Case No. 13,661. Kansas C. C. U. S. No. 107. J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, plaintiff in error, *vs.* Elbridge G. Blunt. Filed September 28, 1889.

147 U.S. 647

Office Supreme Court U. S.
FILED.
NOV 4 1892
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

J. P BAUSERMAN, Administrator of the Estate of JAMES G. BLUNT, deceased,
Plaintiff in Error,
vs.
ELBRIDGE G. BLUNT.
Defendant in Error.

No. 107.

In Error to the Circuit Court of the United States for the District of Kansas.

BRIEF FOR PLAINTIFF IN ERROR.

J. H. GILLPATRICK,
FRANK HAGERMAN,
Attorneys for Plaintiff in Error.

THE S. F. WOODY PTG. CO., KANSAS CITY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

J. P. BAUSERMAN, Administrator of the Estate of JAMES G. BLUNT, deceased,
Plaintiff in Error,
vs
ELBRIDGE G. BLUNT,
Defendant in Error.

No. 107.

In Error to the Circuit Court of the United States for the District of Kansas.

STATEMENT FOR PL INTIFF IN ERROR.

Defendant in error, as plaintiff below, upon February 13, 1886, sued plaintiff in error, as the administrator of the estate of James G. Blunt, in the District Court of Leavenworth county, Kansas, upon a promissory note of date July 1, 1875, whereby the said Blunt promised one day after

date to pay him $3204.34, with 10 per cent interest. (Pet. Rec. 1–2.) In the state court defendant below filed a demurrer, upon the ground that the cause of action was barred by limitation. (Rec. 3.) Before the demurrer was heard a petition and bond for removal to the United States Circuit Court were duly filed and the cause transferred thereto (Rec. 4–5.), where the demurrer was heard and overruled. (Rec. 6.) Such ruling constitutes one of the assigned errors. Afterwards an answer (Rec. 6–7.) and reply (Rec. 8.) were duly filed. A jury was waived (Rec. 10.) and, after trial, judgment rendered for plaintiff below. (Rec. 10–11.) A bill of exceptions (Rec. 12–24.) was duly filed and a writ of error sued out, thus bringing the case here. The defense was that the cause of action was barred by limitation. (Answer, Rec. 6–7.)

The petition (Rec. 1–2.) stated that the note sued on was due one day after its date, July 1, 1875, and at the execution thereof Blunt, the maker, was a resident of Kansas; that Blunt died July—, 1881, leaving property and debts in Kansas, yet no administrator was appointed until December 14, 1885; and that Blunt had been absent from the state between the time of making the note and his death, for "more than five years." The answer (Rec. 6–7.) pleaded the statute

of limitations and averred that Blunt's absences from the state between the time of executing the note and his death were but temporary and that during such absences his family remained in Kansas at his usual place of residence, so that service of process in any suit could at any time have been made. The reply (Rec. 8.) specifically averred that the note was dated July 1, 1875; became due July 2, 1875; that Blunt died July —, 1881; that his administrator was appointed December 14, 1885; that this action was commenced February 13, 1886; and that during his lifetime, and after the maturity of the note, Blunt was personally absent from the state for spaces and periods "aggregating full five years."

It will be thus observed that the pleadings establish these facts: Plaintiff upon February 13, 1886, sued upon a note due July 2, 1875; that the debtor died July —, 1881, and for five years of the time between the maturity of the note and the death of the debtor the latter was absent from the state, though his family was then present at his usual place of residence, and that an administrator was never appointed until December 14, 1885.

The evidence showed (Rec. 13.) that $100 was paid on the note December 1, 1875, and the balance was due and unpaid; that the maker,

Blunt, died July 25, 1881; that his administrator was appointed December 14, 1885, and this action was commenced February 13, 1886; that from the time of the execution of the note the debtor had a family residing in Kansas under such circumstances that process could at any time have been served upon him, but that personally he was temporarily absent from that state on business at different times from July 1, 1875, to July 25, 1881, more than enough time to have taken the case out of the statute of limitations at the time of his death, if his personal presence in Kansas were necessary for the statute to run.

There were offered (Rec. 22–23) in evidence Sections 18 and 21 of Article 3, Chapter 80; Section 64 of Article 6, Chapter 80, and Section 12 of Article 1, Chapter 37 of the Compiled Laws of Kansas, 1879 and 1885, reading as follows:

"SEC. 18. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: First. Within five years: an action upon any agreement, contract or promise in writing. Second. * * * * * * * * *

"SEC. 21. If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if,

after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

"SEC. 64. The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at anytime before the return day.

"SEC. 12. Administration of the estate of an intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled thereto in the following order, to-wit:

"FIRST. His widow, or next of kin, or both, as the court may think proper; and if they do not voluntarily either take or renounce the administration within thirty days after the death of the intestate, they shall, if resident within the county, upon application of any one interested, be cited by the court or judge for that purpose.

SECOND. If the persons so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect, for twenty days after service of said citation, without any sufficient cause, to take administration of the estate, the court shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust.

THIRD. If there be no such creditors, and the court is satisfied that the estate exceeds the value of one hundred dollars, the court shall commit the administration to such other persons as it shall deem proper."

The substance of these provisions is: A cause of action upon a note is barred in five years. The time during which the debtor is "out of the

state" shall not be computed. Although the debtor be personally "out of the state," yet if he have a usual place of residence therein he may be sued and there legally served with process. Within fifty days after the death of a debtor, in the absence of the appointment of an administrator, the right is given to the creditor to have such an appointment made.

The bill of exceptions (Rec. 23–24) recites:

"Whereupon the court, being of opinion that the personal absence of the debtor from the State of Kansas, notwithstanding his residence in the state where service of a summons could be made on him, was sufficient to prevent the bar of the statute of limitation, and that the statute of limitation was suspended from the debtor's death until the appointment of his administrator, gave judgment for the plaintiff for $7396.02, with 10 per cent interest per annum from the date of the judgment. Whereupon the said defendant made his exception to the said opinion and finding of the court."

It will be thus observed that the court below upon the trial distinctly decided: First, that the statute of limitations did not run during the personal absence of the debtor from the state, notwithstanding he had at such time a residence therein, where, during such absence, service of process could have been made upon him; and, secondly, that the statute was suspended for the entire time from the date of the debtor's

death, July 25, 1881, until the appointment of the administrator, December 14, 1885, notwithstanding the defendant in error, as a creditor, could at the end of fifty days from the date of the death have had an appointment made. The latter question was also raised by the demurrer and by the ruling thereon decided against plaintiff in error.

ASSIGNMENT OF ERRORS.

I.

The court below erred in holding (Rec. 23.) as a conclusion of law that "the personal absence of the debtor from the State of Kansas, notwithstanding his residence in the state, where service of a summons could be made on him, was sufficient to prevent the bar of the statute of limitation."

II.

The court below erred in holding (Rec. 23.) "that the statute of limitation was suspended from the debtor's death until the appointment of his administrator," when it affirmatively appeared in the record (P. 23.) "that said James G. Blunt died intestate on July 25, 1881, and that said J. P. Bauserman was duly appointed and qualified as administrator of his estate on the 14th day of December, 1885, by the probate court of Leavenworth County, Kansas, and this action was commenced on the 13th day of February, 1886," and when under Section 12, Article 1, Chapter 37, Compiled Laws of Kansas, 1879 and 1885, the defendant in error could have taken out administration within

fifty days after July 25, 1881, the date of the death.

III.

The court erred in overruling (Rec. 6.) the demurrer to the petition, (Rec. 3.) because said petition upon its face, showed that the cause of action was barred by the laws of Kansas.

IV.

The petition (Rec. 1–2.) and the matters therein contained are not sufficient in law to maintain this action, because the note sued upon matured July 2, 1875, and suit was not instituted until February 13, 1886, and the greatest length of time possible to be deducted from the period, according to the facts pleaded, is five years and one day for the absence of the debtor and fifty days for the period after the death during which the defendant in error could not sue out letters of administration; and under Section 18, Article 3, Chapter 80 of the Compiled Laws of Kansas, 1879 and 1885, the cause of action sued upon was barred by limitation.

ARGUMENT FOR PLAINTIFF IN ERROR.

I.

The court below erred in holding (Rec. 23.) that the statute of limitations did not run during the personal absence of the debtor from the state, when during such absence he had a home therein at which his family resided, so that process could at any time have been served.

It is to be remembered that more than five years elapsed between the maturity of the note and the death of the debtor. Nothing else appearing the action was barred by Section 18, Article 3, Chapter 80, of the Compiled Laws of Kansas, 1879 and 1885, providing as follows:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: First. Within five years; an action upon any agreement, contract or promise in writing. Second. * * *"

The debtor was, however, personally absent from such state during such period a sufficient length of time to prevent the bar of the statute during his lifetime, if personal service is necessary under Section 21, of the same article and chapter, reading as follows:

"If, when a cause of action accrues against a person, he be out of the state, or has absconded

or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

But it appears that the debtor during his personal absence left in the state his family at his usual place of residence, so that he could have been sued and service of process had under Section 64, Article 6, Chapter 80, (Comp. Laws. of Kansas, 1879 and 1885.) reading as follows:

"The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day."

The learned judge below held (Rec. 23.) that the time the debtor was so personally absent was to be deducted from the time which elapsed between the maturity of the note and the death of the debtor. One of the real questions then is whether a mere personal absence of the debtor, when service of process can be had, puts the debtor "out of the state" within the meaning of Section 21, or whether that section contemplates the deduction of that period of time only, during which it is impossible to sue the debtor and serve process upon him.

The limitation law of Kansas is a statute of repose to be liberally construed for the purpose of putting an end to litigation and relieving a debtor from the enforcement of a stale demand where the evidence of the defense may be lost or difficult to supply. (*Sibert vs. Wilder*, 16 Kans., 176; *Bauserman vs. Charlott*, 46 Kans., 480, 484.) Such is the general and well recognized rule in relation to such laws. (*McDonald vs. Havey*, 110 U. S., 619–621; *Leffingwell vs. Warren*, 2 Black, (U. S.) 599; *Hanger vs. Abbott*, 6 Wall., 532, 538; *Nick vs. Martindale*, 1 Harper Law Rep., 138.)

There is great force in the application of this rule to this particular case, because here the lips of the debtor have been sealed by death, and his voice could not be heard in asserting defenses known to himself alone.

It may be conceded that the language "out of the state" would literally cover mere temporary personal absences where there was a residence at which service of process could be made. But it is a well settled rule that statutes when reason and justice so require, may be interpreted in such a manner that acts within the letter shall be considered as without the meaning and acts without the letter shall be considered as within the meaning.

In Plowden's Com., 467, this subject is discussed and, among other things it is said:

"And from hence it appears that there is a great diversity between these two equities — the one abridges the letter, the other enlarges it; the one diminishes it, the other amplifies it; the one takes from the letter, the other adds to it. So that a man ought not to rest upon the letter only, * * * but he ought to rely upon the sense, which is temperated and guided by equity, and therein he reaps the fruit of the law, for, as a nut consists of a shell and kernel, so every statute consists of the letter and the sense; and as the kernel is the fruit of the nut, so the sense is the fruit of the statutes."

That such a rule is applicable to a question like that now under consideration has been recognized by this court, which has decided that the excepting clause of a statute of limitations should not be taken literally but that where there was an exception as to persons "beyond the seas" the words should be construed to be equivalent to "beyond the jurisdiction of the state," because the purpose of the exception was to meet cases where the debtor was not amenable to the process of courts. (*Faw vs. Roberdeau*, 3 Cranch, 174; *Murray vs. Baker*, 3 Wheat, 541; *Bank of Alexandria vs. Dyer*, 14 Peters, 141.) The same principle has upon unanswerable reasoning been repeatedly applied to words like those in the Kansas statute, so that the expression "out of the state" is construed to mean beyond the reach of the process of court, and not to include temporary

absences where there was left in the state a family upon whom service could be legally made. (Buswell on Limitations and Adverse Possession, Section 113; Wood on Limitation, pp. 485–487; *Hoggett vs. Emerson*, 8 Kan., 262; *Wilson vs. Koontz*, 7 Cranch, 202; *Barney vs. Oelrichs*, 138 U. S., 529; *Blodgett vs. Utley*, 4 Neb., 25; *Ward vs. Cole*, 32 N. H., 452; *Hackett vs. Kendall*, 23 Vt., 275; *State vs. Furlong*, 60 Miss., 839; *Vanlandingham vs. Huston*, 4 Gilm., (Ill.) 125; *Sage vs. Hawley*, 16 Conn., 106; *Crehore vs. Mason*, 23 Me., 413; *Varney vs. Grows*, 37 Me., 306; *Gilman vs. Cutts*, 27 N. H., 348; *Kerwin vs. Sabin* (Minn.) 52 N. W. Rep., 642; *Collester vs. Hailey*, 6 Gray, 517; *Penley vs. Waterhouse*, 1 Ia., 498; *Sneed vs. Hall*, 2 A. K. Marsh. (Ky.) 21.)

The line upon which these authorities proceed was clearly indicated by Mr. Justice Brewer, while a member of the Kansas court, for in *Hoggett vs. Emerson*, 8 Kan., 262, he said:

"The scope of purpose of the entire section (Sec. 21.) is to suspend the running of the statute during such periods of time as the debtor is beyond the reach of process from the courts of this state.
* * * * * * * *"

As put by Mr. Justice Miller, (*Tioga R. R. vs. Blossburg & Corning R. R.*, 20 Wall., 137, 152.):

"The liability to suit where process can at all

times be served must in the nature of things be the test of the running of the statute."

In the same line are those cases determining whether a foreign corporation can ever avail itself of the statute since it, being a citizen and resident of the state under whose laws it was incorporated, can never be a resident of any other state. The courts hold that within *the spirit of the limitation law*, it is a resident of any state where it may be served with process. (*U. S. Express Co. vs. Ware*, 20 Wal., 543; *McCabe vs. Ill. Cent. R. Co.*, 4 McCrary, 492, s. c., 13 Fed. Rep., 827; *Huss vs. Central etc. R. Co.*, 66 Ala., 472; *Lawrence vs. Ballou*, 50 Cal., 258; *Wall vs. Chicago, etc., R. Co.*, 69 Ia., 498; *Penn. R. Co. vs. Sloan*, 1 Bradwell, (Ill.) 364.)

As we shall presently see, counsel will claim, in order to suspend running of the statute at the death of the debtor, that the Kansas courts hold, (*Nelson vs. Herkel*, 30 Kan., 456.) that limitation only runs where there is a person to sue, against whom an action may be brought and a right of action enforced. If this be true, though out of line with the literal wording of the statute, it is the sense of the law that no exception should exist where there is such a person who may be sued and legally served with process.

We thereupon conclude that this court should

upon principle hold that the temporary absences of Blunt when his family were at his usual place of residence, under such circumstances that process might be legally served upon him, did not put him "out of the state" so that such absences should be deducted from the period of limitations.

It may be claimed that the Kansas court has decided to the contrary of our contention. If it has, its decision is wrong. If that court so decided and still holds that death suspends the running of the statute because there must be a person to sue, the decisions are conflicting and the courts at sea. Let us examine the Kansas cases. In *Bonifant vs. Doniphan*, 3 Kan, 26, the statement of the case (p. 27.) shows that plaintiff's petition not only alleged the absence but that defendant "*had never resided in the state*," so that process could not have been served. In *Lane vs. Bank*, 6 Kan., 74, the agreed facts showed that Lane *and his family actually resided in Washington*. (p. 76.) In *Blodgett vs. Utley*, 4 Neb., 25, that case was thus distinguished:

"The case of *Lane vs. Nat'l Bank of the Metropolis*, 6 Kas., 74, is cited by the defendant in error as holding that mere absence from the state is sufficient to prevent the statute from running. From the agreed statement of the facts in that case 'that said J. H. Lane resided in Lawrence, Kansas, where he kept and maintained a furnished house; that he was a member of the United States Senate;

that he was in Washington with his wife and other members of his family from November, 1865, until the middle of June, 1866' it is evident that Lawrence was not his usual place of residence during his stay in Washington. The words "usual place of residence" mean the place of abode at the time of service. (*Gadsen vs. Johnson*, 1 Nott and McCord, 89.) If the party is out of the state for a temporary purpose merely, then his residence is still here, and service may be made at his usual place of residence. (*Frean vs. Cruikshanks*, 3 McCord, 84.)"

The opinion in *Conlon vs. Lanphear*, 37 Kan., 431, neither discussed the particular point here involved nor referred to *Hoggett vs. Emerson*, 8 Kan., 265. It was reported after the decision in the case at bar. Upon the facts in the Bonifant and Lane cases it did not appear that the usual place of residence was in the state so that process could be served. The question here presented was not necessarily involved. It certainly does not appear to have been discussed. If that be true, the cases are not controlling according to *Carroll vs. Carroll*, 16 How., 287. It is certain that the Kansas cases are inconsistent. Thus in *Toby vs. Allen*, 3 Kan., 399, and *Nelson vs. Herkel*, 30 Kan., 456, the language of the statute was ignored and an exception created by suspending the statute when there was no person to sue. Yet this spirit failed in prevailing in *Bonifant vs. Doniphan*, 3 Kan., 26, *Lane vs. Bank*, 6 Kan., 74, and *Conlon*

vs. Lanphear, 37 Kan., 431, if, as claimed, it was there held that absences from the state should be deducted, notwithstanding suit could have been brought and process served, and notwitstanding that a contrary doctrine was announced in *Hoggett vs. Emerson*, 8 Kan., 262. Such conflict in authority leads us to the conviction that there is no *settled* construction of this statute by the Kansas court. What then shall this court do? In *Pease vs. Peck*, 18 How., 595, Mr. JUSTICE GRIER said:

"When the decisions of the state courts *are not consistent*, we do not feel bound to follow the last if it is contrary to our own convictions."

In *Randall vs. Brigham*, 7 Wall., 523, 541, the limitation of the rule was thus indicated:

"This construction of the highest court of the state, *not called in question by any conflicting decision of that court*, is conclusive upon us."

II.

The court below erred in holding (Rec. 23.) that the statute of limitations was suspended from the time of the debtor's death, July 25, 1881, until the appointment of the administrator, December 14, 1885.

Not only did more than five years elapse between the maturity of the note and the death of the debtor but nearly five years elapsed between the death and the institution of the suit. The bill of exceptions (Rec. 13.) recites:

"That said James G. Blunt died intestate on July 25, 1881, and that said J. P. Bauserman was duly appointed and qualified as administrator of his estate on the 14th day of December, 1885, by the probate court of Leavenworth county, Kansas, and this action was commenced on the 13th day of February, 1886."

It has already been seen that under the Kansas law (Comp. Laws, Chap. 37, Art. 1, Sec. 12.) any creditor of a deceased debtor could take out letters of administration after the expiration of fifty days from the date of the death. Not only is this the plain reading of the statute but so the Kansas court has expressly decided. (*Bauserman vs. Charlott*, 46 Kan., 480.)

The court below, in the case at bar, not only decided that the death of the debtor suspended the operation of the statute of limitation *but that such suspension lasted until an administrator was actually appointed*, even though this was from July 25, 1881, to December 14, 1885, a period of four years, four months and nineteen days, for the bill of exceptions (Rec. 23–24.) recites:

"Whereupon the court being of opinion that the personal absence of the debtor from the State of Kansas, notwithstanding his residence in the state where service of a summons could be made on him was sufficient to prevent the bar of the statute of limitation, *and that the statute of limitation was suspended from the debtor's death until the appointment of his administrator*, gave judgment for the

plaintiff for $7,396.02 with 10 per cent interest per annum from the date of the judgment. Whereupon the said defendant made his exception to the said opinion and finding of the court."

The general rule is that when a statute once begins to run it will continue to run without being impeded by any subsequent disability. (*McIver vs. Ragan*, 2 Wheat., 25; *Hogan vs. Kurtz*, 94 U. S., 773, 779; *Harris vs. McGovern*, 99 U. S., 161; *McDonald vs. Hovey*, 110 U. S., 619; See also cases cited in Bailey's Conflict of Judicial Decisions, 166; 13 Amer. and Eng. Enc. L., 731.)

Consequently the courts say that the death of the debtor after the statute begins to operate in no sense suspends the running of the statute. The authorities so overwhelmingly announce this doctrine that it is no more than necessary to cite them: *Baker vs. Brown*, 18 Ill., 91; *Rhodes vs. Smethurst*, 4 M. & W., 42; *Miller vs. T. & P. R. Co.*, 132 U. S., 662, 692; *Hayman vs. Keally*, 3 Cranch C. Ct., 325; *Bozeman vs. Browning*, 31 Ark., 364; *Stewart vs. Spedden*, 5 Md., 433; *Byrd vs. Byrd*, 28 Miss., 144; *Stevenson vs. McReary*, 12 S. & M., (20 Miss.) 9; *Dekay vs. Darrah*, 2 Green, (N. J.) 288; *Granger vs. Granger*, 6 Ohio, 35; Keyser's Appeal, 124 Pa. St., 80; *Tyson vs. Britton*, 6 Tex., 222; *Cole vs. Runnels*, 6 Tex., 272; *Handy vs. Smith*, 30 W. Va., 195; *Tynan vs. Walker*, 35

Cal., 634; *Wilsons vs. Harper*, 25 W. Va., 179; *Harshberger vs. Alger*, 31 Grattan, 52, 67.)

As said in argument in *Rhodes vs. Smethurst*, 4 M. & W., 42, "if this were not so, then Sundays and holidays would interrupt the statute also."

As an original proposition the court would probably concede us the law as thus claimed. We are then to determine whether the decisions of the Kansas court preclude us from making the contention.

That court in *Green vs. Goble*, 7 Kansas, 297, decided that the statute was not suspended by the death of the *creditor*, saying:

"As a general rule, when a statute begins to run it continues to run until the demand is barred. This principle is laid down with great uniformity in all the authorities, and may be considered as settled. Undoubtedly the legislature may prescribe differently, and in this state several exceptions are made, but none such as is claimed in this case. This is of itself a strong reason against the rule as claimed by plaintiff in error, and being wholly unsupported by the authorities it cannot be allowed to prevail in this case."

In *Toby vs. Allen*, 3 Kansas, 399, and *Nelson vs. Herkel*, 30 Kansas, 456, it was decided in general terms that the death of the debtor suspended the running of the statute because, as put in the last case:

"Not only must there be a person to sue, but the cause of action cannot accrue or exist unless there is a person, *in esse*, against whom an action can be brought, and the right of action enforced. It is therefore held, that the death of the debtor operates to suspend the statute of limitations until an administrator is appointed. * * *"

We will not attempt to reconcile these cases, since the decisions in the last named cases are irreconcilable with the *language* of the opinion in Green vs. Goble, *supra*. It is sufficient to say that none of them attempted to decide that the time of the suspension lasted longer than fifty days, the period during which the creditor could upon his own behalf take out letters of administration. Prior to the decision below in this case no such point had been considered by the Kansas court. And so it was held in *Bauserman vs. Charlott*, 46 Kansas, 480, a case decided since. That was an action against the same estate as represented by the plaintiff in error. Indeed he was the plaintiff in error in that case. The question was precisely the same as that here involved. HORTON, Ch. J., said:

"It is true that this court has said that the question of personal absence of the debtor from the state, and not the question of residence or non-residence, affects the running of the statute under the provisions of Sec. 21, of the civil code. * * * It is also true that this court has said that the death of the debtor operates to sus-

pend the statute. * * * * * *But this court has never said, when the question was properly presented*, that the creditor can indefinitely prolong the time of limitation by his own omission or refusal to act, or that the death of the debtor operates to suspend the statute of limitations indefinitely. * * * *"

The learned judge then proceeded to determine, that since under the laws of Kansas the creditor could himself take out letters of administration within fifty days after the death of the debtor, that such death could in no event suspend the statute for a longer period of time. The principle upon which the court proceeded was that a person could not prevent the running of the statute by delaying action upon his own part. That principle had been twice before announced by the same court (*A., T. & S. F. R. Co. vs. Burlingame*, 36 Kan., 628; *Rork vs. Com. of Douglas Co.*, 46 Kan., 175.)

The principle thus definitely announced was applied by this court in a case involving the question whether a suspension of a statute of limitation could continue at a time when a plaintiff could, by his own action, put an end to it. (*Braun vs. Sauerwein*, 10 Wall., 218, 223, 224.) In that case it was decided that the suspension would not last through such time, and Mr. JUSTICE STRONG said:

"How long did the suspension continue? To this there can be but one answer. Manifestly only so long as he was prevented from suing. * * *

If, in fact, he was disabled a longer time, the prolonged disability was caused by his own neglect to appeal. * * * The time which he permitted to elapse * * * was not taken from him by any controlling power. He lost it by his own delay. It would be giving a most unreasonable construction to the act to hold that, by merely delaying to appeal, when it was all the time in his power, he could have suspended the running of the statute indefinitely."

Kirby vs. Lake Shore, etc., R. Co., 120 U. S., 130, involved the question of the length of time the New York statute of limitation was suspended in case of death. The statute provided for suspension from the date of death to the granting of letters and for a certain period thereafter. Original letters were issued in Illinois upon the probate of the will. Ancillary letters were a long time afterwards taken out in New York. The question was whether the suspension of the statute continued for the statutory period after the issuance of the ancillary letters. The court held not, because there was nothing after the probate of the will in Illinois to prevent the taking out of letters in New York. Mr. Justice Harlan said:

"As this was in the executor's power to have done at any time he can hardly claim that his own voluntary delay should extend the period for the institution of a suit."

The same doctrine was announced by Mr. Justice Bradley, in *Amy vs. Watertown*, 130 U. S., 320, 325, in this language:

"But when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it."

In many cases involving the question whether death suspended the statute pointed expressions have been used indicating the bent of judicial minds. Thus, in *Baker vs. Brown*, 18 Ill., 91, that question was before the court and it was held in an exhaustive opinion, that the statute was not suspended *until the appointment of an administrator*, because the creditor could have procured such an appointment upon his own application and could not take advantage of his own neglect in such respect.

In *Granger vs. Granger*, 6 Ohio, 35, 42, it was said:

"If a creditor would save his debt from the statute bar, he should take out administration himself. * * *"

In *Byrd vs. Byrd*, 28 Miss., 151, it was said:

"It is true that there was no administrator of the estate from April, 1844, until February, 1853, but the statute had commenced running previous to April, 1844, and the rule is that when once it begins to run it runs on unless the party is restrained by some statute from pursuing his remedy. Want of administration on the estate would not be sufficient to stop the running of the statute, *because the court would at any time, upon application of a person interested, have granted letters of administration.*"

In *Richardson vs. Williams*, 5 Porter, (Ala.) 522, it was said:

"It is insisted that Williams having died, previous to the judgment recorded against the plaintiff, and no administration appearing to have been had upon his estate, there was no one to proceed against, so that the statute could not begin to run. * * * *We are of opinion that it was his duty to have procured the appointment of the sheriff to that office*, which would have been done by the county court by showing *prima facie* that Williams had been dead as many as three months and his estate unadministered upon."

In *Cheatham vs. Carrington*, 14 La. An., 707, it was said:

"The creditor is bound to provoke an administration of the estate in accordance with law."

In *Nick vs. Martindale*, 1 Harper Law Rep., 138, it was said:

"Here it is clear that the plaintiff might have proceeded earlier than he did. *He might have administered sooner.* * * * But to what consequences might this lead? Administration might not be taken out for years and thus claims kept alive, contrary to the very policy of the statute, until all evidence of payment be lost. I am not inclined to multiply the exceptions to the statute; I think it has very properly been called a statute of repose, and that is a good shield against dishonest claims."

The principle has been variously applied. An obligation payable or cause of action arising upon demand cannot be sued upon until the demand is made. If, however, the holder unreasonably delays in mak-

ing the demand his cause of action is lost. If such delay runs for the time within which a cause of action is ordinarily barred the delay is unreasonable and there can be no recovery. (*Keithler vs. Foster*, 22 O. St., 27; *Lutrop vs. Joyce*, 9 Pa. St., 410; *R. Co. vs. Byers*, 32 Pa. St., 22; *Morrison's Adm'r vs. Mullin*, 34 Pa. St., 12; *Ball vs. K. & N. W. R. Co.*, 62 Ia., 751.)

We therefore submit that the decision of this case should be controlled by *Bausermin vs. Charlott*, 46 Kans., 480, because the opinion therein is a construction by the Kansas court of a Kansas statute, and because reason and authority unite in vindicating its correctness.

The rule is well settled here that the statute of limitations, as construed by the highest court of the state, is binding and conclusive upon this court. (*Davie vs. Briggs*, 97 U. S., 628; *Tioga R. Co. vs. B. & C. R. Co.*, 20 Wall., 137; *Kibbe vs. Ditto*, 93 U. S., 674; *Bank vs. Eldred*, 130 U. S., 693.)

At the time this case was decided in the circuit court, November 26, 1888, (Rec. 10.) the Kansas court had decided that the death of the *debtor* suspended the running of the statute, (*Toby vs. Allen*, 3 Kan., 399; *Hanson vs. Towle*, 19 Kan., 273; *Nelson vs. Herkel*, 30 Kan., 456.) but that the death of the *creditor* had no such effect. (*Green vs. Goble*, 7 Kan., 297.) The question whether

the failure of the creditor to take out letters of administration prevented a continuation of the suspension had not been, as we have already seen, at that time considered or decided by that court. (*Bauserman vs. Charlott*, 46 Kan., 480.) The point not having up to that time been made, considered or decided, no opinion theretofore rendered can be said to be a binding authority. (*Carroll vs. Carroll*, 16 How., 275, 287.) The decision in *Bauserman vs. Charlotte*, 46 Kansas, 480, is, however, within the doctrine announced in *Carroll vs. Carroll*, *supra*, binding upon this court.

But irrespective of these considerations, we submit that if the statute had, at the time of the decision below in this case, received one construction and, before the hearing of the cause by this court, the state court changed its ruling, this court would be bound by the latest decision. Such we understand to be the express holding as to a statute of limitation in *Green vs. Neal*, 6 Pet., 291, 299; *Leffingwell vs. Warren*, 2 Black, 599, 603; *Moores vs. Nat'l Bank*, 104 U. S., 625. Such is the result of *Miller vs. Ammon*, 145 U. S., 421, 423.

The most that could be claimed by counsel as to the reversal by a state court of a former upon some other subject is that this court is entitled to exercise its own judgment as to whether the latest decision of the state court is right. (*Burgess vs.*

Seligman, 107 U. S., 20, 33; *Anderson vs. Santa Anna*, 116 U. S., 356, 362.) We feel confident that with the exercise of such judgment the decision below cannot stand. It is, however, doubtful as to whether this court can exercise any judgment of its own where the construction is of an internal statutory regulation, such as a statute of limitations. (*Miller vs. Ammon*, 145 U. S., 421, 423.)

III.

The court below erred in overruling (Rec. 6.) the demurrer to the petition (Rec. 3.).

In the state court a demurrer was filed (Rec. 3.) alleging as a cause thereof:

"That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this said defendant, and that it appears by the said petition that the alleged cause of action therein stated is barred by the statute of limitations."

After the removal the demurrer was overruled and an exception preserved. (Rec. 6.)

It is the settled practice in Kansas that advantage of the statute of limitation may be obtained by demurrer, as a petition showing a cause of action that is barred is held to state no cause of action. (*Zane vs. Zane*, 5 Kan., 134; *Bartlett vs. Bullene*, 23 Kan., 606, 613.)

This rule has been recognized by this court. (*Mercantile etc. Bank vs. Carpenter*, 101 U. S., 567. and cases cited.) This court has distinctly decided that if a demurrer be overruled such ruling is not waived by answer and going to trial. (*Teal vs. Walker*, 111 U. S., 242, 246.) In that case Mr. JUSTICE WOODS said:

"The writ of error is not taken to reverse the judgment of the court upon the demurrer to the complaint, for that was not a final judgment, but to reverse the judgment rendered upon the verdict of the jury. The error, if it be an error, of overruling the demurrer could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer nor is it cured by verdict. The question therefore, whether the complaint in this case states facts sufficient to constitute a cause of action, is open for consideration."

It is certain that if a petition fails to state a cause of action the question can be raised for the first time in the Supreme Court. (*Slacum vs. Pomery*, 6 Cranch, 221; *U. S. Bank vs. Smith*, 11 Wheat., 171.)

Our contention is that the question last discussed plainly arises upon the demurrer. Let us

see if such is not the case. The petition was filed Feby. 13, 1886. (Rec. 2.) It averred the execution of a note July 1, 1875, payable one day after date; the death of Blunt July 25, 1881; the appointment of the administrator, Dec. 14, 1885; that plaintiff after the execution of the note and before his death had been out of the state for more than five years; (Pet. Rec., 1.) hence it appears that between the execution of the note and death at least six years elapsed, and that between the death and the institution of the suit 4 years, 7 months and 12 days elapsed. Of the latter 50 days *but no more*, (See argument, Div. II.) are to be deducted for the period in which the creditor could not administer. It was for defendant in error to clearly plead the facts creating a statutory exception. *Marstellar vs.* (*McClean* 7, Cranch. 156; *Miller vs. McIntyre*, 6 Pet., 61, 64; *Brown vs. Sauerwein*, 10 Wall., 218, 223.) Construing the pleading, according to the Kansas rule, most strongly against the pleader, (*Draper vs. Cowles*, 27 Kan., 484, 486, 487; *Beadle vs. K. C., Ft. S. & M. R. Co.*, (Kan.) 29 Pac. Rep., 696; see also *U. S. vs. Linn*, 1 How., 104, 110.) the allegation of absence from the state for "more than five years" cannot be construed to mean a longer period than five years and one day. The pleader could have meant no more, because in the reply (Rec. 8.) the absences are stated

to have aggregated "full five years." The petition therefore shows that between the maturity of the note and the institution of the suit there elapsed 10 years, 7 months and 11 days. Deducting the five years and one day for the absences pleaded and the 50 days during which the creditor could not administer, would leave 5 years, 5 months and 19 days in which to bar the action.

We therefore submit that upon the face of the petition the action was barred, and the demurrer was improperly overruled.

Respectfully submitted.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

J. P. BAUSERMAN, ADMINISTRATOR OF THE ESTATE OF JAMES G. BLUNT, DECEASED, PLAINTIFF IN ERROR,

v.

ELBRIDGE G. BLUNT, DEFENDANT IN ERROR.

Term No. 107.

In Error to the Circuit Court of the United States for the District of Kansas.

Supplemental Argument by Plaintiff in Error in Reply to the Reply Brief of Defendant in Error.

FRANK HAGERMAN,
J. H. GILLPATRICK,
Attorneys for Plaintiff in Error.

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No. 107.

In Error to the Circuit Court of the United States for the District of Kansas.

Supplemental Argument by Plaintiff in Error in Reply to the Reply Brief of Defendant in Error.

We have examined with some care the brief filed for defendant in error. As there seems to be some misapprehension as to what was decided in Bauserman *v.* Charlott (46 Kan. 480), and since in our judgment it is controlling as to one point in this case, we attach a copy of the opinion as an appendix to this argument, so that each justice may for himself have it before him when examin-

ing the case. One or two questions made by counsel demand consideration.

I.

It is said (Brief for Defendant in Error, pp. 59, 60) that since sec. 54 of chapter 2 of the laws of Kansas, 1854, p. 18, provided that letters of administration could in no case be granted to a non-resident, the whole argument as to the suspension of the statute of limitations loses its force. Had counsel looked further they would have noticed that this same section has always been in force in Kansas. Laws, 1859, chap. 2, p. 18; compiled laws, 1868, p. 436, ch. 37, sec. 28; *id.* 1879, p. 412, chap. 37, art. 1, sec. 28 (2313); *id.* 1885, p. 412, chap. 37, art. 1, sec. 28 (2471); *id.* 1889, p. 839, ch. 37, art. 1, sec. 28 (2812).

As Charlott, the plaintiff in the Missouri judgment, under consideration in Bauserman *v.* Charlott (46 Kan. 480), was a non-resident, and the foregoing provision of the statute has been at all times in full force, it is perfectly apparent that the sense in which the court in that case spoke was this: That for 30 days the absolute right to administration was vested in the widow and next of kin, thereafter and upon service of twenty days' notice any creditor could himself be appointed *if a resident*, but if a non-resident such creditor as "*one interested*" could make application and the court would then "commit the administration to such other persons as it should deem proper." Such is the literal reading of sec. 12, art. 1, chap. 37, Compiled Laws 1879, and 1885, and for the convenience of the Court we again set it out:

"SEC. 12. Administration of the estate of an intestate shall be granted to some one or more of the persons here-

inafter mentioned, and they shall be respectively entitled thereto in the following order, to wit:

"FIRST. His widow, or next of kin, or both, as the court may think proper; and if they do not voluntarily either take or renounce the administration within thirty days after the death of the intestate, they shall, if resident within the county, *upon application of any one interested*, be cited by the court or judge for that purpose.

"SECOND. If the persons so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect, for twenty days after service of said citation, without any sufficient cause, to take administration of the estate, the court shall commit it to one or more of the principal creditors, *if there be any competent* and willing to undertake the trust.

"THIRD. If there be *no such creditors*, and the court is satisfied that the estate exceeds the value of one hundred dollars, the court shall commit the administration to such other persons as it shall deem proper."

Now, then, the whole point of the decision in Bauserman *v.* Charlott, *supra*, was that the defendant in error had it *within his power to cause to be taken out letters of administration* within fifty days after the death of the debtor, and failing so to do until after the statutory period of limitation elapsed, he has lost his right of action.

II.

We are told that the decision in Bauserman *v.* Charlott (46 Kan. 480) is not binding because made after the decision below in this case, and also because it declared the law to be different from what it had been declared to be up to the time of the trial below. We have already seen (our brief, p. 22, 23) that the Kansas court had never decided that the statute was suspended during a time when a creditor could have caused letters of administration to be issued. But independently of any such con-

sideration we submit that, if it should be conceded that the Kansas court held one way at the time of the trial below, and subsequently changed its ruling, still there are two complete answers to the positions assumed :

1. The most that could be claimed would be that this court would be free to exercise its own independent judgment as to what the law should be. (Burgess *v.* Seligman, 107 U. S. 20, 23 ; Anderson *v.* Santa Anna, 116 U. S. 356, 362). With the exercise of this judgment, this Court, in line with most of the courts, would unquestionably hold that death did not suspend the statute (original brief, pp. 20, 21). This Court recognized the law to be so in Miller *v.* Texas & Pacific R. Co. (132 U. S. 662, 692), where it was said : "The statute having commenced to run against him *was not suspended by his death.*" * * *

But independently of this suggestion the doctrine of Bauserman *v.* Charlott *(supra)* should, upon principle, stand.

As counsel construe the statute (sec. 12, *supra)* this would be the result: that, failing the issuance of letters of administration, the statute of limitations would never bar the claim of a non-resident; and, further, that no such creditor could procure administration and prosecute his claim against an intestate Kansan until he, the creditor, had first become an actual, *bona fide* resident of Kansas. The creditor must come to Kansas, gain a residence (as if suing for a divorce), and take letters of administration personally before he can pursue the estate of his deceased debtor. Surely this, under the light, letter, and spirit of the statute, is a *reductio ad absurdum.*

Counsel do not argue the merits of the question, but seem to think that this Court is bound by the latest decision of the State court which had been rendered at the time of the trial below. Such is not and has never been the law.

The language of Mr. Justice Ni
19 Cal. 4[illegible], quoted with approval in Blis
Ed.) Sec. 20[illegible] shows the inapplicability o
from Mandeville v. Wilson 5 Cranch. 18.

2d. The construction of a statute of limitation is what has been designated by Mr. Justice Brewer as a question "of a particularly local character" (Miller *v.* Ammon, 145 U. S. 421, 423), and this Court has no less than three times held that the latest construction by the State court is binding and will reverse a judgment based on the construction in force at the time of the trial below. (Green *v.* Neal, 6 Peters, 291, 299; Leffingwell *v.* Warren, 2 Black, 559, 603; Moores *v.* National Bank, 104 U. S. 625.)

III.

It is not thought necessary to add anything to what is submitted in division I of our original brief.

But, replying to what is offered by counsel to avoid the effect of the demurrer discussed in division II of our brief, it is submitted that the defendant in error is in no position to claim that the intestate's absence aggregated more than one day beyond five years, and a glance at the pleadings will so demonstrate. It was plaintiff's duty to clearly plead facts excepting the case from the operation of the statute. (Marstellar *v.* McClean, 7 Cranch, 156; Miller *v.* McIntire, 6 Pet., 61, 64; Browen *v.* Sauerwein, 10 Wal., 218, 223.) His petition (Rec. 1) averred the absences to be for "more than five years."

The reply (Rec. 8) stated the absences to aggregate "full five years," not that they exceeded that period.

This could not be taken to be more than one day beyond that period, because the pleading, according to the rules prevailing in Kansas and in this court, is to be construed most strongly against the pleader. (Draper *v.* Cowles, 27 Kan., 484, 486, 487; U. S. *v.* Linn, 1 How., 104, 111.)

There is no room for saying that the pleadings are susceptible of two meanings, as counsel say, for the purpose of

...ld in Smith v. Richmond ...Rules on Code Pleading (2d.-...ty of the expression quoted ...3.

avoiding the rule requiring a pleading to be construed against the pleader. Nor is there anything in the record to show that there was a widow or heir in whom rested the peculiar knowledge of the extent of Blunt's absences. More than this, if the burden be on defendant in error to state the exception taking the case out of the statute, he has not done so, no matter how liberally his pleadings be construed.

According to the pleadings and allowing five years and one day for the absences, there elapsed between the maturity of the note, July 2, 1875, and the institution of the suit, February 13, 1886, 10 years 7 months and 11 days. Deducting five years and one day for the absences pleaded and fifty days during which the creditor could not administer would leave five years five months and nineteen days in which to bar the action.

The demurrer, it is confidently maintained, was well taken, and that the error in overruling the same is fatal.

It is claimed by counsel, but not seriously, that the plaintiff in error is in no position to present to the Court the question already discussed, whether the statute was suspended from the death of the debtor until the appointment of the administrator, since the bill of exceptions (Rec. 13) reciting "that the debtor was absent more than enough time to take this case out of the statute if personal presence in the State were necessary for the statute to run," means that his absence was for the whole period from the maturity of the note till his death.

As we have already seen, the question fairly arises upon the demurrer (Orig. Arg., Div. III) and can be presented without regard to any bill of exceptions or the contents thereof, because proceeding with the trial did not waive the error committed in overruling the demurrer. (Teal *v.* Walker, 111 U. S. 242, 246; Rogers *v.* Burlington, 3 Wal. 654.)

But, independently of such a consideration, we submit that counsel are in error as to their contention. It is very certain that the judge who signed the bill of exceptions intended to preserve for presentation to this Court both questions discussed, for the bill of exceptions (Rec. 23–24) recites:

"Whereupon the court, being of opinion that the personal absence of the debtor from the State of Kansas, notwithstanding his residence in the State where service of a summons could be made on him, was sufficient to prevent the bar of the statute of limitation, *and that the statute of limitation was suspended from the debtor's death until the appointment of the administrator*, gave judgment for the plaintiff for $7,396.02, with 10 per cent. interest per annum from the date of the judgment."

There is no doubt of the proposition that a law case tried by a court may be reviewed upon the record proper without a bill of exceptions. In this way there may be a review of the sufficiency of the petition (Slocum *v.* Pomeroy, 6 Cr. 221; U. S. Bank *v.* Smith, 11 Wheat. 171), rulings upon demurrer (Rogers *v.* Burlington, 3 Wall. 654), or the sufficiency of the finding of fact to support the judgment (Allen *v.* St. Louis Nat. Bank, 120 U. S. 20). The sufficiency of the evidence is not reviewed, but the court will review any matter of law presented by the bill of exceptions. (Norris *v.* Jackson, 9 Wall. 125, 128; Flanders *v.* Tweed, 9 Wal. 425, 430; Kearney *v.* Case, 12 Wal. 275; Jessup *v.* U. S., 106 U. S. 150.) There seems to be no fixed rule by which the matter of law must be raised. It is sufficient if stated as a conclusion by the court. (Walnut *v.* Wade, 103 U. S. 683; Sun Mut. Fire Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485; Williams *v.* U. S., 137 U. S. 113, 136.)

Tested by these considerations it is perfectly clear that

the foregoing conclusion stated in the bill of exceptions was intended to be the subject of review, and that it was erroneous, we have endeavored to show (Orig. Brief, Div. II), yet the effect of counsel's contention is to the contrary.

The rule is that error is presumptively prejudicial and the burden is upon defendant in error to show *beyond doubt* that there could have been no prejudice. (Deery *v.* Gray, 5 Wall. 807; Smiths *v.* Shoemaker, 17 Wall, 630, 639; Gilmer *v.* Higley, 110 U. S. 47, 50; R. Co. *v.* O'Brien, 119 U. S. 99, 103.)

It cannot be fairly claimed that the presumption of prejudice is overcome by the statement (Rec. 13) in the bill of exceptions before referred to, for the simple reason that the court was by such a statement endeavoring only to show how the question arose as to the personal absence of the debtor, and the true sense in which the clause was used was that the debtor was personally absent so much of the time between the execution of the note and the date of his death that if such personal absence prevented the running of the statute of limitation the action was not barred *at his death*. As to the length of time during which the statute was suspended by the death, no statement of fact was necessary, because it appeared that the debtor died July 25, 1881, and that the administrator was appointed December 14, 1885, the bill of exceptions (Rec. 13) reciting—

"That said James G. Blunt died intestate on July 25, 1881, and that said J. P. Bauserman was duly appointed and qualified as administrator of his estate on the 14th day of December, 1885, by the probate court of Leavenworth county, Kansas, and this action was commenced on the 13th day of February, 1886."

The time—fifty days after the expiration of which the creditor could, at his own instance, sue out letters—was purely a matter of calculation. If by the extract relied on the court meant that all the time the debtor was personally present in the State, added to the time which elapsed between the death and issuance of letters of administration, was no bar, then an idle ceremony was performed in declaring *one* of the questions of law in the case to be *whether the running of the statute was suspended from the death until the appointment of the administrator*. That the court below construed the bill as contended for by us is also apparent from the fact that the bill contains certain sections of the statutes of Kansas (Rec. 23) providing as to the time within which administration may be taken out. There was no necessity for offering the statutes since judicial notice is taken thereof, but such offer by the parties, and a recitation thereof by the court, indicates that every one thought that the issue was in the case. The bill is vague because it says the case was tried upon the following "facts and evidence," and then certain conclusions are set out, followed by a deposition. It is impossible to say whether the "facts" referred to were admitted by the parties or found by the court. The clause under consideration is more in the nature of a conclusion of law than a statement of fact within the rule of Walnut *v.* Wade (103 U. S.)

To admit the claim as contended for adds to the time pleaded at least five months and twenty days before limitation can run. We submit that such a conclusion is strained. The language of Mr. Justice Davis in Simpson *v.* Hall (3 Wal. 460, 473, 474), in this connection is pertinent. He said:

"In this case the bill of exceptions is unskilfully

drawn, and is justly subject to criticism; but it clearly enough appears that the rulings of the circuit court which are sought to be reviewed here were excepted to in proper time, and when the cause was on trial, and not afterwards. If this is so we cannot allow a valuable right to be defeated because the judge carelessly used a word in the present tense, when the true expression of his meaning required the use of a word in the past tense."

To adopt the construction of the bill of exceptions contended for is to make technical words override the sense of a document, and if words in their technical sense are to govern we may suggest that there is no jurisdiction of this cause because the petition for removal did not *distinctly and positively aver* the citizenship of the parties at the time of the institution of the suit. The averment in the petition (Rec. 4) was—

"That the controversy in said suit is between citizens of different States, and that the petitioner, the defendant herein, was at the time of the commencement of this suit and still is a citizen and resident of the State of Kansas, and that said plaintiff *was* and still is a citizen of the State of Illinois."

We thus see that it was averred that plaintiff below "*was* and still is a citizen of the State of Illinois." *Was* when? At the time the controversy arose, or at some other time? The time when he *was* such citizen is left entirely to inference. He may or may not have been a citizen of the State of Illinois at the time of the institution of the suit. It is well settled that the record should show the requisite citizenship, not only at the time of filing the application for removal, but also at the time of the institution of the suit. (Gibson *v.* Bruce, 108 U. S. 561; H. & T. R. Co. *v.* Shirley, 111 U. S. 358; Akers *v.* Akers, 117 U. S. 197; Stevens *v.* Nichols,

130 U. S. 230; Crehore *v.* O. & M. R. Co., 131 U. S. 240; Jackson *v.* Allen, 132 U. S. 27; Graves *v.* Corbin, 132 U. S. 590. LaConfiance, etc., *v.* Hall, 137 U. S. 61; Killain *v.* Keith, 144 U. S. 568.) This citizenship at such times "should be distinctly and positively averred in the pleadings," or "should appear affirmatively and with equal distinctness in other parts of the record." (Stevens *v.* Nichols, 130 U. S. 230.) And the duty of this Court when the citizenship does not thus appear is to reverse the cause at the cost of appellant, with directions to the court below to remand it to the State court, and this regardless of the fact that the party upon whose application the removal was made is the appellant. It is immaterial by whom the question is raised. (Stevens *v.* Nichols, 130 U. S. 230; Graves *v.* Corbin, 132 U. S. 590, and cases cited; Torrence *v.* Shedd, 144 U. S. 527; Killain *v.* Keith, 144 U. S. 568.)

Taking the broad view of the case and construing the record with liberality and fairness, the case should be reversed for the errors pointed out in the original brief. If, however, technical objections are to prevail, then there is as much reason for denying the jurisdiction of the court as there is for construing the bill of exceptions as contended for.

Respectfully submitted.

FRANK HAGERMAN,
J. H. GILLPATRICK,
Attorneys for Plaintiff in Error.

APPENDIX.

J. P. BAUSERMAN, *as Administrator of the Estate of James G. Blunt, deceased,* v. C. S. CHARLOTT.

1. FOREIGN JUDGMENT—*Limitation of Actions.* Where an action is brought in this state, upon a judgment of a court of record of a sister state, which is in full force in that state, the statute of limitations of this state, and not that of the sister state, will control.

2. ——— *Statute of Repose.* The statute of limitations of this state is a statute of repose, and must be favorably considered. (*Taylor v. Miles*, 5 Kas. 498; *Siebert v. Wilder*, 16 id. 176; *Freeman v. Hill*, 45 id. 435.)

3. CASES, *Followed.* The cases of *Railroad Co. v. Burlingame Township*, 36 Kas. 628, and *Rork v. Comm'rs of Douglas Co.*, ante, p. 175, followed.

4. ADMINISTRATION—*Diligence in Presenting Claim Against Decedent's Estate.* Under the provisions of the statutes of this state, a creditor of a decedent, having a claim which he wishes to establish against the estate, may, if the widow or next of kin refuse to take out letters of administration, obtain letters for himself or some other person, after 50 days from the death of decedent; and he cannot, without any good cause or reason therefor, defer making such application until the statute of limitations has run, and then claim that all of the time from the death of the debtor to the appointment of the administrator the statute of limitations is suspended on account of the non-appointment of such administrator. If a creditor would save his claim against the estate of a decedent from the bar of the statute, he must exercise reasonable diligence, if the widow or next of kin refuse to take out letters of administration, to obtain administration for himself or some other person.

Error from Leavenworth District Court.

THE opinion contains a sufficient statement of the facts. Judgment for plaintiff, *Charlott*, at the December term, 1889. The defendant, *Bauserman*, as administrator of the estate of James G. Blunt, deceased, brings the case to this court.

J. H. Gillpatrick, for plaintiff in error; *W. Green*, of counsel.

William A. Porter, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: On the 15th day of December, 1874, C. S. Charlott recovered a judgment against Joesph Pulitzer and Gen. James G. Blunt, in the circuit court of the city of St. Louis, in the state of Missouri, for $1,023.72. General Blunt died on the 25th of July, 1881. On the 14th day of December, 1885, J. P. Bauserman was appointed administrator of his estate by the probate court of Leavenworth county. On the 14th day of December, 1888, C. S. Charlott brought his action in the district court of Leavenworth county against J. P. Bauserman, as administrator of the estate of General Blunt, deceased, to recover a balance of $535 upon the Missouri judgment. The defendant pleaded the statute of limitations. Judgment was rendered in favor of Charlott for $535 and costs. The defendant below excepted, and brings the case here.

It was admitted upon the trial that during all the time from December 15, 1874, and prior thereto, until the death of General Blunt, on July 25, 1881, he had kept and maintained his home and usual place of residence in Leavenworth city, in this state; that during all said time this was continuously open and occupied by his family, consisting of his wife and children, where service of a summons could have been made upon him by leaving at his usual place of residence a copy thereof. It was also admitted upon the trial that General Blunt was personally absent, or "out of the state" so much of the time from the 15th day of December, 1874, to the date of his death, on the 25th of July, 1881, that, if such personal absence from the state prevented the running of the statute of limitations, the judgment was not barred at his death. But it is further admitted that if the periods of time during which General Blunt was personally present in Kansas, from the 15th of December, 1874, to his death, on the 25th of July, 1881, were taken with and added to the time from July 25, 1881, to the appointment of Bauserman as the admin-

istrator of his estate, on the 14th of December, 1885, less the time allowed by the statute for the widow or next of kin to be granted administration, they aggregated more than five years. It is also admitted that, if the periods of time which General Blunt was present in Kansas after the 15th day of December, 1874, to the 25th of July, 1881 (the date of his death), were added to the time from his death to the commencement of this action (the 14th day of December, 1888), more than six years had elapsed. The administrator was appointed more than 11 years after the rendition of the Missouri judgment; more than four years after the death of General Blunt; and this action in this state to recover upon that judgment was not commenced until three years after the appointment of the administrator. This action was therefore commenced 14 years after the rendition of the judgment in Missouri, and more than seven years after the death of General Blunt.

We are asked, in a very able argument presented by the counsel representing the estate of General Blunt, to re-examine and reconsider the prior decisions of this court, ruling that, if the debtor is out of the state for a temporary purpose, such temporary absence cannot be computed as any part of the period within which the action must be brought. (Civil Code, § 21.) And we are further asked to re-examine and reconsider the prior decisions of this court, holding that the death of the debtor suspends the running of the statute, where the statute has commenced to run in the life-time of the debtor.

For the purposes of this case, and the full protection of estates of decedents from all liability for stale or dishonest claims, which in the nature of things the heirs of a decedent could not as successfully defend against as if the intestates were living, it is not necessary at this time to reconsider any of the former decisions of this court, and therefore it is not necessary now for us to comment upon the prior decisions referred to. It is true that this court has said that the question of personal absence of the debtor from the state, and not the question of residence or non-residence, affects the running of the statute under the provisions of § 21 of the civil code. (*Bonifant v. Dauphan*,

3 Kas. 26; *Lane v. Bank*, 6 id. 74; *Hoggett v. Emerson*, 8 id. 262; *Morrell v. Ingle*, 23 id. 32; *Conlon v. Lanphear*, 37 id. 431; *C. K. & N. Ry. Co. v. Cook*, 43 id. 83.) It is also true that this court has said that the death of the debtor operates to suspend the statute. (*Toby v. Allen*, 3 Kas. 399; *Hanson v. Towle*, 19 id. 273; *Nelson v. Herkel*, 30 id. 456; *Mills v. Mills*, 39 id. 455.) But this court has never said, when the question was properly presented, that the creditor can indefinitely prolong the time of limitation by his own omission or refusal to act, or that the death of the debtor operates to suspend the statute of limitations indefinitely. Within the provisions of our civil code concerning limitations, an action can only be brought within this state upon a Missouri judgment within five years after its rendition, if during all that time the judgment debtor is personally present within the state. (Civil Code, § 18, subdiv. 1, 6; *Mawhinney v. Doane*, 40 Kas. 676.)

The precise question is, if, under the prior decisions of this court, the death of the debtor operates to suspend the statute of limitations, is the statute indefinitely suspended? Clearly, a creditor ought not to gain any advantage by his own *laches* or by his own delay.

"When a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim or instituting such proceedings as the law regards sufficient to preserve it." (*Amy v. Watertown*, 130 U. S., 325. *Tynan v. Walker*, 35 Cal. 643.)

"In a case where some act is to be done or condition precedent to be performed by a party to entitle him to his right to sue, and no definite time is fixed at which the act is to be done or condition performed, he must exercise reasonable diligence to do the one or perform the other, or he will be barred by the statute of limitations; otherwise it would be in his power to defeat the law by his own negligence and wrong." (*Shelburne v. Robinson*, 8 Ill. 597, 598.)

It is the contention of the counsel of the plaintiff below that the statute of limitations was suspended all the time General Blunt was "out of the state," from the 15th of December, 1874, to his death, on the 25th of July, 1881, and also all the time from the 25th of July, 1881, to the 14th of December, 1885, when the administrator was appointed at the instance of the alleged creditors. This latter period of time was over four years. Under the provisions of § 2796, Gen. Stat. of 1889 (Gen. Stat. of 1868, ch. 37, § 12), 30 days are given the widow or next of kin to take out letters of administration. If they do not do so, then, upon the application of anyone interested, they may be cited by the probate court or the judge thereof for that purpose, and if they neglect for 20 days after the service of the citation to take administration, the court must commit it to one or more of the principal creditors, if any are competent or willing to undertake the trust. Therefore, if the plaintiff below had availed himself of those means which the law provides for prosecuting his claim, he could have taken action as soon as 50 days had elapsed after the death of his alleged debtor. If a creditor would save his debt from the statute bar, he should take out administration himself. (*Granger v. Granger*, 6 Ohio, 35.) The statute of limitations in this state is a statute of repose. It was enacted for the benefit of defendants, "to exempt them from being called to account in respect to transactions long gone by." Such statutes are favorably considered. (*Taylor v. Mills*, 5 Kas. 498.) In that case, it was said:

"When the statute has run its full time, the effect is to leave the parties in possession of just what they had before, nothing more and nothing less; and neither party has a right of action against the other. The injured party has lost his remedy." (*Sibert v. Wilder*, 16 Kas. 176; *Freeman v. Hill*, 45 id. 435; 25 Pac. Rep. 870.)

This statute ought to be liberally construed as to claims against the estates of decedents. The dead man cannot speak or answer, and the next of kin may have no knowl-

edge respecting the claim which the creditor has not attempted to sufficiently enforce in the life of the decedent. It was decided in *Railroad Co. v. Burlingame Township*, 36 Kas. 628 (14 Pac. Rep. 271), "that a person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him." It was also said in that case, that "to permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitation which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote."

It is also said in *Rork v. Comm'rs of Douglas Co.*, 45 Kas. 175 (26 Pac. Rep. 393), that—

"If the plaintiff could delay the presentation of his certificates to the board of county commissioners for five years, then he could delay for 10, 15, or any indefinite period of time. He should have presented his tax certificates to the board of county commissioners 'for refunding, (for the return of his taxes, interest, etc.) before the expiration of three years after their issue. This he failed to do, and he also failed to allege any reason or excuse for his delay."

Following these decisions, the claim of plaintiff below is both stale and barred by the statute. He has slept so long upon his rights, if he had any at the death of General Blunt, that he cannot now recover. If, in fact, the plaintiff below was disabled for 50 days after the death of General Blunt from instituting any proceedings or action to recover on his judgment of the 15th of December, 1874, the disability ended with the expiration of the 50 days. If he was denied the right to sue in that period of time, he could have taken action as soon as that time expired, but he did not then act. He did not act within any reasonable time thereafter. He delayed more than four years after the death of General Blunt before he had an administrator appointed, and then delayed three years after such appointment before commencing this action. The reasonable time within which a creditor, having a claim against

a decedent, and wishing to establish the same against his estate, should make application for administration, would be under the statute 50 days after the decease of the intestate, or at least within a reasonable time after the expiration of 50 days. But a creditor cannot, as in this case, postpone the appointment for months and years, and then recover upon his claim. If he can do so for several months or several years he can do so for any indefinite length of time, and then resort to administration and establish his claim. This is not in accord with the policy of the statutes, nor with our prior decisions. We do not think it accords with right or justice in establishing claims against the estates of decedents.

Upon the pleadings and the agreed facts, the judgment of the district court will be reversed, with direction to render judgment against plaintiff below and in favor of the administrator of the estate of James G. Blunt, deceased.

All the Justices concurring.

147 U.S. 647

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IN THE

Supreme Court of the United States.

October Term, 1892.—Term No. 107.

J. P. BAUSERMAN, Administrator of the Estate of JAMES G. BLUNT, Deceased, Plaintiff in Error,

vs.

ELBRIDGE G. BLUNT.

In Error to the Circuit Court of the United States for the District of Kansas.

OPENING AND REPLY

Briefs in Behalf of Defendant in Error.

By SAMUEL SHELLABARGER,
JEREMIAH M. WILSON, and
JOHN L. PENDERY.

Press of McGILL & WALLACE, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

J. P. BAUSERMAN, Administrator of the estate of James G. Blunt, deceased, Plaintiff in Error,

vs.

ELBRIDGE G. BLUNT, Defendant in Error.

No. 107.

In Error to the Circuit Court of the United States for the District of Kansas.

The Facts.

1886, February 13.—Action was brought by Elbridge G. Blunt, plaintiff, against J. P. Bauserman, administrator of the estate of James G. Blunt, deceased, defendant, in the District Court in the county of Leavenworth, Kansas, on a promissory note by defendant's intestate, James G. Blunt, to the plaintiff, on the 1st day of July, 1875, due in one day after date, for the sum of $3,204.34, bearing interest at the rate of ten per cent. per annum from date, on which note was a credit of $100, dated December 1, 1875.

In addition to the ordinary averments of a petition on such a note, the petition, in substance, alleged as follows: That the said James G. Blunt, at the time of making

and executing said note, was a citizen and resident of the State of Kansas, and, for a long time prior and subsequent thereto, was such citizen and resident; that the said James G. Blunt died intestate on the 25th day of July, 1881, leaving property and debts in the State of Kansas; that there never was any administrator appointed on the estate of the said Blunt until defendant was appointed as such administrator, on the 14th day of December, 1885; and that the said Blunt had been absent from and out of the State of Kansas prior to his death, and subsequent to the making of said note, for more than five years. (R., pp. 1 and 2.)

1886, February 13.—Process issued, and return of service on Bauserman, administrator. (R., pp. 2 and 3.)

1886, March 8.—Demurrer by the defendant, Bauserman, to the petition of plaintiff. Grounds of said demurrer are, in substance, as follows:

That petition does not state facts sufficient to constitute a cause of action, and that it appears by the petition that the alleged cause of action therein stated is barred by the statute of limitations. (R., p. 3.)

1886, March 13.—Petition of defendant for the removal of said cause to the Circuit Court of the United States for the District of Kansas, alleging that the amount in dispute exceeds the sum of $5,000; that the controversy in said suit is between citizens of different States, and that the petitioner (defendant), at the time of the commencement of the suit was, and still is, a resident of the State of Kansas, and that the plaintiff was, and still is, a citizen of the State of Illinois. (R., p. 4.)

1886, March 13.—Defendant presents to the court his said petition and bond for the removal of said cause to the Circuit Court of the United States for the District of Kansas, and said petition is granted and bond accepted. (R., p. 5.)

1886, June 10.—In the Circuit Court of the United States for the District of Kansas, the demurrer above referred to came on to be heard, was argued, and by the court overruled, and exception was noted to said ruling by defendant. (R., p. 6.)

1886, June 23.—Answer of defendant to petition of plaintiff filed. After denying each and every allegation and averment contained in said petition, except such as are specially admitted, the answer alleges, in substance, as follows:

That the said James G. Blunt did not, at any time within five years next after the accruing of the alleged cause of action, undertake or promise to the plaintiff, in manner and form as averred, that his residence was in the city of Leavenworth, Kansas, and that process could there be served under the Kansas statute. (R., p. 6.)

1886, August 11.—General denial by plaintiff of the allegations of the answer filed. (R., p. 7.)

1886, September 28.—Plaintiff's specific reply to second defence of answer, alleging that said Blunt, during his lifetime, after the maturity of said note and prior to his death, was out of the State of Kansas and personally absent therefrom for full five years, during which time he was insane, and so continued to be until the time of his death, and that this action was brought within a year from the appointment of administrator. (R., p. 8.)

1887, December 19.—Defendant's demurrer to plaintiff's reply on the ground that it furnishes no answer in law to the plea of the statute of limitations. (The Record does not disclose that this demurrer was ever specifically acted on.) (R., p. 9.)

1888, January 9.—Stipulation of counsel in writing waiving jury, and agreeing that action may be tried by court. (R., p. 10.)

1888, November 26.—Action came on for trial by court; and, thereupon, the court, having heard the evidence

and arguments of counsel, finds for plaintiff and assesses damages at $7,396.02; judgment given accordingly. (R., pp. 10 and 11.)

It appears by the bill of exceptions that the court found the facts as follows:

(a) That the intestate gave his note to plaintiff as above set forth.

(b) That James G. Blunt died intestate July 25, 1881; that plaintiff, Bauserman, was appointed administrator the 14th of December, 1885, by Probate Court of Leavenworth, and that this action was commenced the 3d of February, 1886.

(c) That intestate kept his residence and home in Leavenworth from the time of making the note to his death in July, 1881, and that his home was open and occupied by his family and children where summons could have been served.

(d) That the debtor, in person, was temporarily absent from Kansas on business at different times from 1875 to his death, and that such absence was more than enough to take the case out of the statute of limitations, if a personal presence in Kansas be necessary for the statute to run. (R., p. 13.)

1888, November 26.—Motion for new trial by defendant on following grounds:

(a) That the decision and finding of the court was contrary to law and not sustained by the evidence.

(b) Errors of law occurring in trial and excepted to by defendant.

(c) That finding and decision should have been for defendant instead of plaintiff. (R., p. 11.)

1889, February 11.—Motion for new trial overruled, to which ruling and judgment defendant excepted. (R., p. 12.)

1889, February 11.—Bill of exceptions signed. (R., p. 24.)

This bill of exceptions extends from page 12 to page 24, both inclusive, and contains, besides the above-stated findings of fact as set forth on page 13, the testimony of plaintiff, showing the absence of Blunt in Washington; and, at pages 22 and 23, sets forth the sections of the Kansas statute which were brought into notice in the case.

1889, September 11.—Citation to Elbridge G. Blunt, and affidavit of service on same day. (R., pp. 28 and 29.)

1889, September 11.—Writ of error to Supreme Court of the United States allowed by David J. Brewer, circuit judge. (R., p. 30.)

1889, September 11.—Assignment of errors by plaintiff in error for transmittal to the Supreme Court of United States, alleging error as follows:

(a) That petition and matters contained therein are not sufficient in law.

(b) That judgment should have been given for defendant and not for plaintiff. (R., pp. 27, 28.)

BRIEF FOR DEFENDANT IN ERROR.

Propositions of Law.

Section 21 of article 3 of chapter 80 of Kansas Code reads as follows (R. 23):

"SEC. 21. If, when a cause of action accrues against a person, he be out of the State, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the State, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the State, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

All the other sections of the statutes of Kansas brought in view in this case are found at pages 22 and 23 of the Record.

Personal Absence Suspends the Bar.

Under said provision of section 21, it is held that the continued residence of the defendant's family (in this case plaintiff's intestate) in Kansas from the time of the maturity of the note sued on up to the death of the intestate is wholly immaterial, and that it is the *personal* absence of the intestate from the State that suspends the running of the statute.

It is so held in the following cases:

In the case of Hoggett *v.* Emerson *et al.* (8 Kansas, 262), decided in 1871, opinion by Brewer, J., the court decides on the present point what is thus stated in the syllabus:

"The question of presence or absence from the State, and not the question of residence or non-residence, affects the running of the statute under section 21 of the Code of Civil Procedure."

On page 265, in the opinion by Justice Brewer, will be found, in exact substance, this language quoted from the syllabus.

In the case of Lane, admr., *v.* Bank of the Metropolis (6 Kansas, 74), the decision was based on the 28th section, chapter 26, Compiled Laws of Kansas, and is found on page 79 of 6th Kansas Reports, *and is in the same words* as the present section 21, except that the word "territory" occurs where the word "State" occurs in section 21.

The intestate in this case was Senator Lane, of Kansas. On page 79 the court says that the admitted facts in the case are, in substance, that the maker of the note, Senator Lane, at the time of the execution thereof, had a furnished house in the City of Lawrence, Kansas, which was the usual residence of himself and family, and so continued to be his and his family's usual place of residence after the cause of action accrued on the note and up to the

time of his death, on or about the 11th of July, 1866, and thereafter that of his family; that it was also admitted that, after the accruing of the cause of action, the maker of the note was absent from the State, attending to his duties as senator, a sufficient time to prevent the statute of limitations from running against the note if the time he was thus absent should be excluded from the time limited by the statute for the bringing of the suit.

On page 81 the court reaches its conclusion in these words:

"We hold, therefore, that under section 28 the statute of limitations *did not run* upon the note in question during the absence of the maker from the city, as by the admitted facts appear, and that as a consequence the action thereon was not barred at the commencement of the suit."

In the case of Morrell *v.* Ingle, decided in 1879 (23 Kansas, 32), opinion by Brewer, J., the case decided what is thus expressed in the syllabus:

"In an action by a judgment debtor to recover real estate sold upon execution where the defence is a sheriff's deed of record for over five years and the consequent bar of the statute of limitations, the *absence of the defendant* from the State will prevent the running of the statute as in other cases."

In the case of Conlon *v.* Lamphear (37 Kansas, 431), decided in 1887, the action was on an *open account*, and which, by section 18, is barred within three years (Dassler's Annotated Kansas Statutes, p. 645), and the court unanimously reaffirmed the doctrines laid down in Lane's Admr. *v.* Bank (6 Kansas, 74), and held what the head note thus expresses:

"Where a defendant, in an action against him on an *open account*, relies upon the statute of limitations for a defence, *he must establish the fact* that he has been present in person within the State for three years since the date of

the last item in such account before the commencement of the action (Lane's Admr. *v.* Bank, 6 Kansas, 74)."

In the case of Railway Co. *v.* Cook's Admr., decided in 1890 (43 Kansas, 83–87), what is decided, bearing upon the present point, is thus stated in paragraph 2 of the syllabus :

" If the legal title to the real estate in controversy was vested in a non-resident *who was absent* from the State, and who was the immediate grantor of the appellant, *the statute of limitations ceased to run during the absence from the State of such grantor.* (Morrell *v.* Ingle, 23 Kan., 32, cited and followed)."

It is, of course, established by this uniform line of decisions, beyond all controversy, that the residence of the intestate's family in Kansas from the date of the maturity of the note until the death of the intestate, is a wholly immaterial fact, and that the period of intestate's absence from the State during the period between the maturity of the note and his death is subtracted from the five years' period fixed by the statute as constituting the bar in determining the question of the bar.

Burden of Establishing Bar on Party Pleading It.

The next proposition which we present is that the burden of establishing the facts which constitute the bar is upon the defendant below, the plaintiff in error here, and he must, by his pleadings and proofs, establish the facts which constitute the bar.

This doctrine is distinctly assumed in the last-cited case of Conlon *v.* Lamphear (37 Kan., 431), and is an exceedingly familiar principle of general law. It is expressed, in the case of Ritzer *v.* Wood (109 U. S., 187), in these words :

" It is well settled that in the absence of a contrary rule established by statute " (and no contrary rule is established

by the Kansas statutes) "a defendant who desires to avail himself of the statute of limitations as a defence must raise the question either in pleading or on trial before judgment. (Storm *v.* United States, 94 U. S., 76–81; Upton *v.* McLaughlin, 105 U. S., 640.)

The same doctrine is thus stated in Wood on Limitations, section 7, p. 14:

"Another general rule of great practical importance is that the bar of the statute *must be interposed* by the diligence of the debtor, and as early as possible, and usually, unless otherwise provided by statute, on the pleading previous to hearing, and that it will not be raised by the court unsolicited."

See further the numerous cases cited in note 1 on page 15 of Wood on Limitations.

And the further familiar rule, here applicable, is that, where the law requires of a party, in order to make a defence available, that such defence must be *pleaded*, there it further requires that he who asserts such defence, by plea, must *prove* it.

Simonton *v.* Winter, 5 Pet., 141.

On this point Greenleaf (section 74, vol. 1, 13th edition) says:

"A third rule which governs in the production of evidence is that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue."

Citing cases in note 1.

The plaintiff below unnecessarily (as we submit, because, here adopting the words of Chief Justice Marshall in Mandeville *v.* Wilson, 5 Cranch., 18, "a declaration need not set forth the circumstances which take the case out of the statute of limitations") set forth in his declaration what showed that his action was not barred. To that declaration defendant demurred on the ground

that it failed to state facts showing a cause of action, and that it appeared by the declaration that the cause of action therein stated is barred by the statute of limitations (R., p. 3). Thereupon the case was duly removed to the Circuit Court of the United States; and there the demurrer was, on the 10th of June, 1886, overruled, and defendant had leave to answer (R., p. 6), and, in his answer, so far as relates to the statute of limitations, the only averment is that above quoted (R., p. 7), to wit:

"That said James G. Blunt's absence was never but temporary, and that when he absented himself from the State of Kansas it was with the intention of returning to his said home and residence."

It is thus seen that, in the answer of defendant below, *no sufficient averment is made setting up the bar of the statute.* We shall presently see that the Record fails to show that the defendant below established, by proof, the bar.

Death Suspends the Statute of Limitations.

We state our next proposition of law in the following words from the last paragraph in the head note in the case of Toby *v.* Allen (3 Kansas, 399), decided in 1866:

"The death of a debtor operates to suspend the statute until his administrator is appointed, because there must be a party to be sued."

In this case the cause of action on a note and mortgage accrued May 1st–4th, 1861, and the statute had begun to run before the death of the maker of the note (pp. 400–411), and yet the court held, in giving construction to the Kansas statute of limitations, what is expressed in its opinion in these words (p. 431):

"It is true that the death of the debtor operates to suspend the statute until an administrator is appointed, because there must be a party to be sued."

In the case of Carney *v.* Havens (23 Kansas, 82), the court held what is thus expressed in the syllabus:

"If, pending such a contract, the party employed to render the services dies, the statute of limitations does not begin to run on the claim for compensation until, by the appointment of an administrator or executor, there is some one authorized to collect and receive the compensation."

So in the case of Hanson *v.* Towle, Admr. (19 Kansas, 273–278), decided in 1877. The time intervening between the death of the intestate debtor (the action having accrued prior to the death of the said intestate debtor) and the appointment of an administrator on his estate was, by the court, deducted from the three years' bar of the statute of limitations.

So, also, in the case of Nelson *v.* Herkel, admr. (30 Kansas, 456), decided in 1883, the court held what is thus expressed in the syllabus:

"Not only must there be a person to sue, but a cause of action can not accrue or exist unless there is a person in being against whom an action can be brought, and the right of action enforced. *Held*, therefore, that the death of the debtor operates to suspend the statute of limitations until an administrator is appointed."

Citing Toby *v.* Allen, 3 Kansas, 399.

It will be observed in this case that the maker of the note was Sarah J. Northrup; that the note was dated the 13th of October, 1873; was due six months after date, and therefore fell due April 16th, 1874; that the said maker died October 19th, 1876, and therefore that the right of action on said note had existed for *two years, six months, and three days before her death;* that no administration was granted on her estate until July 9th, 1881, that being four years and nine months after her death (p. 456).

The note, with affidavit, was filed as a claim against her estate on the 15th of September, 1881, in the Probate Court, and, on this state of facts, the court in its opinion held as follows (p. 457):

"It is conceded that if the time intervening between the death of Sarah J. Northrup and the appointment of Robert E. Nelson as administrator of her estate is not to be computed as any part of the period within which the action must be brought, the statute of limitations had not run at the presentation of the claim, and, therefore, that the judgment was properly rendered.

"It is the contention of the plaintiff in error, however, that the statute of limitations began to run in the lifetime of Sarah J. Northrup, and, having begun to run in her lifetime, its running was not suspended from the time of her death until the appointment of an administrator of her estate. *The doctrine is well settled in this State to be the other way.* Not only must there be a person to sue, but the cause of action can not accrue or exist unless there is a person *in esse* against whom the action can be brought and the right of action enforced. *It is, therefore, held that the death of a debtor operates to suspend the statute of limitations until an administrator is appointed.* (Toby *v.* Allen, 3 Kan., 399; Hanson *v.* Towle, 19 *Id.*, 273. See also Whitney *v.* State, 52 Miss., 732; Briggs *v.* Thomas, 32 Vt., 176; Etter *v.* Finn, 12 Ark., 632).

"Owing to the death of Sarah J. Northrup and the non-appointment of the administrator until July 9, 1881, the note was not barred on September 15, 1881, at the time of the commencement of this action.

"The judgment of the District Court must, therefore, be affirmed. All the justices concurring."

This case, if well decided, rules the case at bar, and establishes the inapplicability to the case at bar of the case so strenuously relied upon by the plaintiff in error of Bauserman *v.* Charlott (46 Kansas, 480). It (the case of Nelson *v.* Herkell) establishes that an omission to appoint an administrator for the period of *four years and nine months* is not such unreasonable delay in the ap-

pointment of an administrator as that said time will not be excluded from the time computed in making up the bar of five years.

The court, in the case of Bauserman *v.* Charlott, does not decide that the death will not suspend the statute of limitations *for any time;* but, on the contrary, holds that said death will suspend the running of the statute for a *reasonable time;* and, therefore, it is not necessarily in conflict with the law as laid down in said case of Nelson *v.* Herkel (*supra*).

Assuming, therefore, that the last-named case is good law, which this court ought to follow, it is possible to *reconcile* it with the case of Bauserman *v.* Charlott.

But we exceedingly doubt the soundness of the decision in the case of Bauserman *v.* Charlott, because it has the effect of destroying, practically, the statute of limitations in its application to *all* cases where death has operated to suspend the possibility of suit. In all such cases, said decision, which fixes *no* time during which death suspends the running of the statute, utterly abolishes all statutes *definitely* fixing a period for the bar, and forces it upon the suitor, at his own peril, to determine what is a reasonable time during which death suspends the running of the statute.

In the case of Mills *v.* Mills (43 Kansas, 699), decided in 1890, the court holds what is thus expressed in the head note:

"Where a cause of action upon an agreement does not accrue until after the death of one of the parties, the statute of limitations will not begin to run on a claim of the estate of the deceased upon such agreement *until an administrator or executor authorized to collect or enforce the payment of the claim has been appointed* (Carney *v.* Havens, *supra*)."

The cases cited in the opinion of the court in the case of Nelson *v.* Herkel (30 Kansas, 457), to wit, Whitney *v.* The

State (52 Miss., 732), Briggs *v.* Thomas (32 Vt., 176), and and Etter *v.* Finn (12 Ark., 632), are appropriate citations in support of the proposition to which cited, and hold precisely the same doctrine asserted in the case in which they are cited.

In the case of Briggs *v.* Thomas (*supra*), on this point, the court says:

"It has been generally understood, and may now probably be regarded as *settled*, that from the death of the debtor intestate until the appointment of an administrator, the statute would not run, and for the plain reason that during such period there is no mode in which a creditor can enforce his claim (Hapsgood *v.* Southgate, 21 Vt., 584)."

Application of the Facts to Law of the Case.

The propositions of law which we have now stated can not, we submit, in the light of the authorities cited in their vindication, be successfully controverted; and we, therefore, turn to an application of them to the facts of the case at bar.

And, first, as to what length of time the *plaintiff in error shows* that the intestate, James G. Blunt, remained in the State of Kansas after the maturity of said note, and prior to his death. On this point it is not even averred in the plea, by the plaintiff in error, of the statute of limitations, that he remained in the State, *personally, any length of time*. The most that is averred on this point is in the following words from page 7 of the Record:

"The said James G. Blunt's absence was never but temporary, and that when he absented himself from the State of Kansas it was with the intention of returning to his home and residence."

The plea then proceeds to aver that his residence was maintained in Kansas. This averment, being one taken most strongly against the pleader, is an admission that

he may have been personally absent during the *entire* period from the maturity of the note until his death, which the plea calls (and may, for aught we care, have been in fact) a temporary absence in the sense that his residence was not changed, just as was the absence of Senator Lane in the case of Lane's Admr. *v.* the Bank (*supra*).

But, turning to the bill of exceptions (R., p. 16), it will be seen that the proof showed that the said intestate left the State *a few days after the note was given*. There is nothing in the Record, and nothing in the plea of the plaintiff in error, or elsewhere, showing that after his departure the intestate ever returned to the State of Kansas. On the contrary, the finding of fact by the judge to whom the parties submitted their case (R., p. 13), shows that said debtor, in person, was temporarily absent from Kansas on business, from 1875 to his death in 1881, more than enough time to take this case out of the statute of limitations of Kansas, if *personal* presence in the State of Kansas be necessary for the statute to run.

If, therefore, the period between the death of the intestate (July 25, 1881), and the appointment of administration (December 14th, 1885), this period being four years, four months, and nine days, *be counted* as time during which the statute of limitations ran (this in contravention of all such decisions as that in Nelson *v.* Herkel *supra*), still that period being short of five years, and there being no proof of his *personal presence* in Kansas during *any* period of time between the maturity of the note and his death, the bar is not, therefore, affirmatively made out.

This Court not Bound by Last State Decision.

The only other point to which we care to allude in this brief is as to whether the court will follow what is claimed to be the legal effect of the decision in the case of Bauserman *v.* Charlott (46 Kansas, 400).

It is contended on the other side that this court, in construing the statutes of Kansas, must follow the *last* decision of the Supreme Court of the State—this in obedience to the familiar doctrine of this court as laid down in such cases as Burgess *v.* Seligman (107 U. S., p. 20), and in many of the cases cited by this court in said case in note 1, p. 34.

There are two replies to this contention that seem to us to be conclusive against it. One is that, where the decisions of the Supreme Court of the State are not *settled*, but are uncertain or conflicting, this court never feels called upon to follow the said decisions into their confusion.

If, indeed, the case of Bauserman *v.* Charlott designs to hold what plaintiff in error contends it does, to wit, that the death of a debtor and failure to appoint an administrator does *not* suspend the running of the statute, then it is, as we have seen, a direct and palpable contradiction of all the decisions which preceded it in Kansas, and the rule of comity, etc., which requires you to follow the "*settled*" decisions of the Supreme Court of a State in the interpretation of State laws has no application, and you will in such case follow your own judgment. This is abundantly shown by the cases we cite below.

The other answer to the contention, based upon said case of Bauserman *v.* Charlott, is that said rule of comity requiring you to follow the State decisions has no material or controlling application to the case at bar for the reasons expressed by this court in the case of Douglas *v.* Pike County (101 U. S., 686) where the court says:

"Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a *retroactive effect*, and allow them to render invalid contracts entered into with citizens of

other States, which, in the judgment of this court, *were lawfully made.*"

* * * * * * *

"Indeed, if a contrary rule was adopted, and the comity due to State decisions pushed to the extent contended for, 'it is evident,' to use the language of Mr. Chief Justice Taney, in Rowan *v.* Runnels, '*that the provision of the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might be utterly useless and nugatory.*'"

It is true that the cases last cited are, in their main aspect, cases holding that this court is not bound to follow the last decision of a State court where they conflict with the decisions that were in force when *contract* rights accrued; but the principle of these decisions is not *confined* to the class of cases where the settled decisions of a State have become rules of *contract* obligation; but, on the contrary, in cases like the one at bar, of suits between citizens of different States, the rule which declares that this court will follow its own judgment, and not the decisions of the States, applies to *all kinds of suits between citizens of different States pending in the Federal courts.*

This is so for the obvious reason stated in the opinion of the court in the case of Douglas *v.* Pike County (*supra*), where the court, quoting from a former case, says that "*the provision of the Constitution of the United States which secures to a citizen of another State the right to sue in the courts of the United States might become useless and nugatory if the rule of comity was pushed to the extent of holding this court down in such suits between citizens of different States to following the State decisions.*"

How inexpressibly absurd the doctrine would be, holding that citizens of different States should have the absolute right of *departing* from the courts of the States to the courts of the United States for adjudication of their

rights, and which yet compels the courts of the United States to be governed by the last decision of the State courts so escaped from under a constitutional guaranty!

Justice Brewer, in deciding the present case, followed his own judgment and the uniform and unvarying decisions of the State of Kansas *as they existed at the date of the decision*. To say that he was thus bound to follow the State decisions, and that his judgment would be reversed for error if he failed to do so, and at the same time to hold that if, after such decision by Justice Brewer, the State court *changed* its decisions, this court is therefore bound to pronounce that judgment erroneous which, had it been otherwise than it was, would, at the time it was given, have been erroneous, is a reduction of this branch of the law to the supreme of absurdity.

As to this absurdity, this court, in Burgess *v.* Seligman (107 U. S., 33–35), says:

"We do *not* consider ourselves bound to follow the decision of the State court in this case. When the transaction in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals *contrary* to that given by the Circuit Court. The Federal courts have an *independent* jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise *their own* judgment as to the meaning and effect of those laws.

* * * * *

"Acting on these principles, founded, as they are, on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. *As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States, in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it*

would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions."

* * * * *

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no *settled* construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. *It can hardly be contended that the Federal court was to wait for the State courts to decide the merits of the controversy, and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State court has since adopted a different view.* If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so, but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. *Pease* v. *Peck, 18 How., 595*, and *Morgan* v. *Curtenius, 20 Id., 1,* in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

But there is no such absurdity in the law. On the contrary, the law is settled in this court as it is laid down in Burgess *v.* Seligman (*supra*) and Pleasant Township *v.* Life Insurance Co. (138 U. S., 72, 73).

In the former case the court holds what is thus expressed in the third paragraph of the syllabus (107 U. S., 20):

"The courts of the United States, in the administration of State laws in cases between citizens of different States, have an *independent* jurisdiction co-ordinate with that of State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

In Pleasant Township *v.* Life Ins. Co. (138 U. S., 72, 73), this case of Burgess *v.* Seligman is reaffirmed, and the doctrines of it as just quoted are strongly reasserted.

It is, therefore, the unquestioned law of the present case that the case of Bauserman *v.* Charlott (*supra*) has no binding force upon this court, and only has the *persuasive* force which its intrinsic merits, and the rule of comity, as between the State and this court, may give to it. And we submit that it has, in this case, no force if it is meant to assert what is in conflict with the uniform and numerous decisions of the courts of Kansas, which, during half a century, had been settled in that State.

RECAPITULATION.

What we have gone over establishes, as we respectfully and confidently submit, the following propositions conclusive of this case:

1. It is made plain by the words of the Kansas statute, (section 21), and is established by the uniform decisions of the Supreme Court of the State, that the statute of limitations does not run in favor of the defendant, in actions like the present, during the period that he is absent from the State, and that the continued residence of the defendant and his family in the State does not, in such case, cause the running of the statute.

2. That it is not made to appear by the averments in the pleadings of the plaintiff in error, nor by his proofs, that the intestate, James G. Blunt, was *personally* present in Kansas during *any* time between the maturity of the note sued on and his death.

3. That as error is never *presumed* in an appellate court of errors, but, on the contrary, must be made affirmatively to appear, therefore plaintiff in error has shown no

ground for the reversal of the judgment below, because that neither his pleadings nor proofs show that, even if the period of time between the death of said intestate and the granting of administration upon his estate, is treated as a period during which the statute of limitations continues to run, and this period is *added* to the time during which it ran between the maturity of the note and intestate's death, yet the Record fails to establish a bar of five years, because the Record fails to show, affirmatively, that the intestate was *personally present* in Kansas during *any* time between the maturity of the note and the intestate's death.

4. But it is the settled law of Kansas, as established by the decisions of the Supreme Court of that State, from its organization to the date of the decision in Bauserman *v.* Charlott (46 Kansas, 400) that the time between the death of the intestate and the appointment of administration on his estate is *not* computed in making up the bar of the statute.

5. The case of Bauserman *v.* Charlott (*supra*) does not affirm that the death of the intestate did *not* suspend the running of the statute, and, on the contrary, recognizes that it *did* suspend the running of the statute for a *reasonable time*, but fails to state what is a reasonable time, and, therefore, it is not *necessarily* in conflict with what was held in this case in the court below on this point.

6. In actions between citizens of different States, prosecuted in the courts of the United States under the constitutional provision in that regard, this court exercises an *independent* judgment in regard to the construction of State statutes and all other principles of law arising in such cases, and this court is in no degree or sense *bound* by what is alleged to be the decision of the court in the case of Bauserman *v.* Charlott (*supra*).

7. This court is not bound by what is alleged to be the doctrine of Bauserman *v.* Charlott (*supra*), for the additional reason, namely, that this court is never bound by the construction put upon the local laws of a State by the Supreme Court of the State where the condition of the State decisions on the matter in question is not "settled" or is contradictory or confused.

We, therefore, submit that there was no error in the decision of the court below, and the judgment, therefore, will be affirmed.

SAMUEL SHELLABARGER and
J. M. WILSON and
JOHN L. PENDERY,
For Defendant in Error.

WASHINGTON, D. C., *October 20, 1892.*

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.—TERM NO. 107.

J. P. BAUSERMAN, Administrator of the Estate of JAMES G. BLUNT, deceased, Plaintiff in Error,

vs.

ELBRIDGE G. BLUNT, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

REPLY BY DEFENDANT IN ERROR TO BRIEF OF PLAINTIFF IN ERROR.

The opening brief for defendant in error, which here precedes this reply, was printed before the brief for plaintiff in error was filed, or seen by counsel for defendant in error. After seeing that brief counsel for defendant in error decided to make reply to what they regard as the material portions of the brief for plaintiff in error.

The reply is as follows:

Personal Absence Suspends Statute.

We refer to the following cases as establishing the doctrine that where a statute provides, as section 21 does in

this case, that the statute shall not run when the cause of action accrues against a person who is out of the State at the time the cause of action accrued, or where, after the cause of action accrues, he departs from the State, under such statute, so in terms requiring only *personal* absence and not an absent residence, the personal absence suspends the running of the statute.

In the opposing brief, it is contended that at the time of the decision of the present case by Justice Brewer, to wit, November 26, 1888 (R., p. 10), there was no fixed or settled interpretation of these words in section 21, holding that personal absence of a defendant, as distinguished from absence of residence, would suspend the running of the statute during the period of personal absence. (See page 10 of appellant's brief.)

We will first examine the Kansas cases bearing on this question, whether, at the date of the decision below, the fixed interpretation by the Supreme Court of Kansas held that mere *personal* absence, as distinguished from absence of residence, operates to suspend the statute.

In the case of Lane's Administrator *v.* Bank of the Metropolis (6 Kan., 74), cited in our opening brief at page 6, *et seq.*, it will be seen at page 76, *et seq.*, that the earnest contention of counsel for the plaintiff in error, and who maintained that the action was barred, was the same as is now here set up in regard to what this Lane case decided. On that page counsel says:

"The time Lane was out of the State on official business, he having a residence in the State *where process could have been served on him*, should have been counted in estimating the limitation. The facts take the case out of the operation of the exceptions found in section 28, chapter 26, Compiled Laws, page 128, and bring it within the statute prescribing two years' limitation on foreign notes."

To this proposition counsel there cite the authorities. The contention for the defendant in error, and who held

that mere *personal* absence suspended the running of the statute, is found on page 76, *et seq.*, and defendant's counsel on these pages cited numerous authorities to sustain this proposition. The proposition is found, amongst others thus stated, on page 78:

"The intent of the legislature is clear that *all* absence from the State on the part of the debtor should suspend the operation of the limitation, and successive absences may be aggregated where *mere absence is enough.*"

Citing 4 Gilm. (Ills.), 125; 21 Tex., 551; 22 N. Y., 447.

On the same page counsel for defendant states his position thus:

"The exceptions to the statute will be construed to contain *all* the cases intended to be covered by it; and, it having specified *some*, the court can not go outside of those specified for *others* covered by its spirit, or by the original reason for the rule."

Citing 3 Johnson, 265; 13 Wend., 38; 2 Barb. Ch., 432; 14 Mich., 417; 9 Wis., 52, and cases there cited.

On page 79, in the opinion of the court by Safford, the court says:

"It is contended for the defendant below that the rule here" (to wit, in section 21) "laid down is not applicable to, and therefore does not cover the case. The *admitted* facts as to the point in question are in substance: That the maker of the note at the time of the execution thereof had a furnished house in the city of Lawrence in this State, *which was his usual place of residence for himself and family, and so continued to be his and his family's usual place of residence after the cause of action had accrued on said note, and up to the time of his death*, which occurred on the 11th of July, 1866. It is further admitted that after the accruing of the said cause of action on the said note, the maker was *personally* absent out of the State of Kansas, attending to his duties as a member of

the United States Senate and on other business, a sufficient length of time to prevent the statute of limitations from running against the note if the time he was thus absent should be computed in the time limited by said statute for the bringing of suit thereon.

"It seems also to be *conceded* that if section 28, before referred to, be construed according to the *plain* and literal signification of the language used, and in its *common acceptation*, or, in other words, if the legislature, in enacting said section, meant just what they said therein and no more, then and in that case the above admitted facts make a case to which such section is intended to apply. At least, such is our view of the matter. It would be difficult to use language more clear, full, and explicit of the idea which is apparent at a glance and upon the face of the statute, and we are not able to discover any reason why we should give to it any other than such obvious reason.

"Such literal construction does not make a conflict with any other provision of the code; neither are we aware of any circumstances or considerations which imply that the enacting power intended anything further or beyond what it so plainly expressed. 'It is a settled principle in the construction of statutes of limitation that general words are to have a general operation; and unless there can be found in the statute itself some ground for restraining it, it can not be restrained by arbitrary addition or abridgement.'"

Citing, 19 Wis., 60, and authorities there cited.

Then follows what we have quoted on page 7 of our opening brief.

Escape is, in the opposing brief, sought to be made from the force of this most explicit decision, by contending that the agreed facts show that the residence of Senator Lane was changed to Washington, and that his "usual place of abode" ceased to be in Kansas during the period he was in the Senate at Washington.

It will be seen at the bottom of page 79 (6 Kansas), in the statement of the agreed state of facts by the court,

that the court says of this agreed state of facts what we have above quoted, and, amongst other things, that—

"The city of Lawrence, in this State, *which was his usual place of residence for himself and his family,* and so continued to be his and his family's usual place of residence after the cause of action had accrued on said note, and up to the time of his death."

It will also be seen by section 64, quoted on page 5 of plaintiff's brief, that the service of process "in civil actions shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his *usual place of residence at any* time before the return day.

From this it results that in the Lane case, precisely as in the case at bar, it was admitted that the "*usual place of residence of the defendant*" was uninterruptedly in Kansas, and that process could be served on him at that "usual place of residence," although he and his wife may have then been in Washington. Hence it is simply impossible to distinguish the case of Lane from the case at bar, in regard to the point that it holds that *personal* absence, without an absence of residence, suspends the running of the statute.

The opposing brief, at page 14, makes another attempt to escape from the effect of another decision by Justice Brewer, as found in Hoggett *v.* Emerson (8 Kan., 262), decided in 1871, by quoting the language of the Justice, where he says that—

"The scope and purpose of the entire section" (section 21) "is to suspend the running of ths statute during such periods of time as the *debtor* is beyond the reach of process from the courts of this State."

It is by the opposing brief contended that this language indicates that this case held that because the debtor's usual place of residence remained in Kansas he could therefore be served with process, as provided in

section 64, and hence his personal absence did not suspend the running of the statute; and this is contended, notwithstanding the language of the head note in this case is that which we quote at page 6 of the brief of defendant in error, to wit:

"The question of presence or absence from the State, and not the question of *residence* or *non-residence*, affects the running of the statute under section 21 of the Code of Civil Procedure."

That Justice Brewer intimates that mere personal absence from the State does *not* suspend the running of the statute is set up, notwithstanding the language of the Justice in the opinion at the bottom of page 264 and top of 265, which language is as follows:

"This is not enough to take the notice out of the statute. The language of section 21 of our code is, 'if when a cause of action accrues against a person who be out of the State, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the State, or while he is so absconded or concealed,'—'*be* out of the State,' not *reside* out of the State. *The question is not one of domicile, but of personal presence.* A party may reside in Illinois and not spend more than half his time in Kansas. An allegation that a party 'has only been a *resident* of Kansas three years last past' throws no light upon the question of *his* presence in or absence from the State during the years prior thereto."

The language quoted in the opposing brief (p. 14) from the opinion of Justice Brewer simply means what he says in the last quotation, namely: that the scope of purpose and section 21 is to suspend the running of the statute during such periods of time as the *debtor* is personally beyond the reach of process; not that the debtor himself *and his residence* are beyond the reach of process, nor that his usual place of residence must be beyond the reach of process.

In the opinion in the second case there reported (p. 266), opinion by Chief-Justice Kingman, it appears that the question of limitation was raised by demurrer to a petition which showed, not that the place of residence of the defendant had been away from Kansas, but only showed that the defendant *himself* had been in Kansas for three years only immediately preceding the commencement of the action, and that all the time, excepting only the three years immediately preceding the commencement of the suit, the defendant was absent from the State, and never was within its limits or jurisdiction at any moment of time before said three years. His being so absent from the State prevented plaintiffs from suing him, and the question was whether this averment that the defendant *himself* was absent from the State, and not that he had no "usual place of residence in the State," was enough to take the case out of the statute of limitations. The court below held that the action was barred, and that was the only question in the case. The court reversed the judgment of the court below, and held what is thus expressed at the bottom of page 266:

"Section 21 of our Civil Code provides that the statute of limitations does not run while the *debtor* is absent from the State. This section is precisely the same as section 28 of the code of 1859, which was commented on in the case of Bonifant *v.* Doniphan (*supra*); and it was decided in that case that the section applies to a case precisely similar to the case at bar. Following that decision in an application of the law, we hold that in the case made by the petition, the statute of limitations did *not* bar the claim. Consequently the demurrer was erroneously sustained.

"Judgment reversed, all the judges concurring."

It will be seen that the judgment in the case at bar (R., pp. 11, 12) was rendered November 26, 1888. The case of Conlon *v.* Lanphear (37 Kan., 431), cited and commented on in the opening brief of defendant in error (pp. 7 and 8), was decided at the July term of 1887, and

was therefore decided *more than a year before* the case at bar was decided. The head note in this case we have quoted at the bottom of page 7 of our opening brief. At page 432, in the opinion by Holt, J., the court says:

"There is but a single question in the case, and that is whether the statute of limitations has run against the claim of the plaintiff, the defendant in error in this court. Section 21 of the Civil Code, Compiled Laws of 1879, provides."

Then follows a quotation of section 21, found on page 23 of the Record and page 5 of the opening brief of defendant in error.

The court then proceeds as follows:

"The statute has reference to the absence, *personally*, of the defendant from the State. By the agreed statement of the facts, he had been in the State altogether three years since the date of the last item in plaintiff's claim before the commencement of this action. In construing the statute of limitations, *general words are to have a general operation*, and the fact whether his *residence* was changed, or whether he had property within the State, is not to be decided in this action, but simply whether *he himself* was within the State more than three years or less than three years after the last item of the bill was dated. We think the case of Lane's Administrator *v.* Bank of the Metropolis, 6 Kan., 74, is decisive in this case. We therefore recommend that the judgment of the court below be affirmed.

"*By the court:* It is so ordered; all the justices concurring."

We have, in the opening brief for the defendant in error, on the present point cited one case, to wit, Railway Co. *v.* Cook (43 Kan., 83, 87), which was decided *after* the case at bar was decided in the court below. It can not, therefore, be cited for the purpose of establishing the state of the Kansas decisions *at the date of the decision* in in the case at bar; but it can be legitimately cited, and

is cited, for the purpose of showing what was *regarded*, in the year 1870, by the Supreme Court of the State as the "settled construction" of the Supreme Court of Kansas at the date when the case at bar was decided below

This case of Cook (43 Kan., 83), was decided the term before the case so relied upon, in the opposing brief, of Bauserman *v.* Charlott, (46 Kan., 480), was decided. In this case of Cook (*supra*) the court says:

"Counsel for defendant in error, however, claim that the statute of limitations did not cease to run by reason of *Johnson's* absence from the State; 'that the proper person against whom an action to recover possession of lands should be brought, was the person who was in actual, open, and notorious possession of it. An action against a man who was not in actual possession would be invalid.' The Record shows that Cook has been in possession of the land ever since April, 1870; at least, he was in actual possession as tenant and owner for more than fifteen years before these proceedings were instituted; that the Cox heirs could, at any time during these fifteen years, have brought their action against him. This proceeds upon the theory that section 21 of the code applies only to *personal* actions, and does not apply to actions concerning *real* property. Unfortunately for counsel for defendant in error, this court has decided the other way. In the case of Morrill *v.* Ingle, 23 Kan., 42, this court says."

The court, on pages 87 and 88, then makes a lengthy quotation from said case of Morrill *v.* Ingle, the effect and substance of which, so far as relates to the present point, is that which the opening brief of defendant in error quotes at page 7 from the syllabus.

We conclude our citations of the Kansas authorities upon the point that *personal* absence from the State, as distinguished from residence or non-residence, suspends the running of the statute, by a quotation from the case Bauserman *v.* Charlotte (46 Kan., 482, 483). There the court explicitly states what the holding of the Supreme

Court of Kansas had been in regard to *personal* absence from the State suspending the running of the statute. The court says:

"It is true that this court has said that the question of *personal* absence of the debtor from the State, and not the question of *residence* or non-residence, affects the running of the statute under the provisions of section 21 of the Civil Code. (Bonifant *v.* Doniphan, 3 Kan., 26; Lane *v.* Bank, 6 *Id.*, 74; Hoggett *v.* Emerson, 8 *Id.*, 262; Morrill *v.* Ingle, 23 *Id.*, 32; Conlon *v.* Lanphear, 37 *Id.*, 431; C. K. & N. Ry. Co. *v.* Cook, 43 *Id.*, 83.)"

Here, therefore, we have it distinctly affirmed by the Supreme Court of the State in the case so relied upon by the plaintiff in error, that the foregoing cases there by the court cited are *all* cases which hold that it is *personal* absence from the State that suspends the running of the statute; and there was, and at the date of the decision below was, therefore, no conflict of authority in Kansas upon this subject, not even in the case of Bauserman *v.* Charlotte (*supra*).

Under this state of the Kansas decisions it is impossible to fairly contend that there was such uncertainty or conflict in these decisions, as to the proposition that personal absence from Kansas is sufficient to suspend the running of the statute, as to put the case in the position where this court may disregard the decisions of the Kansas courts and follow its own judgment.

We may, however, on this point, add that the weight of authority is, where the statute is one speaking of the personal absence or presence of a defendant and making *that* the ground of suspending, or, on the other hand, of putting in operation the running of the statute, there the *personal* absence or *personal* presence is a matter that controls the operation of the statute, and the "domicile" or "residence" has no controlling effect where such is the statute.

Upon this point we refer the court to the following cases:

Dwight *v.* Clark, 7 Mass., 514;
Little *v.* Blunt, 16 Pickering, 359;
Cole *v.* Jessop, 10 N. Y., 96, 103;
Ruggles *v.* Keler, 3 Johnson Law, 263;
Ford *v.* Babcock, 2 Sandford, 518; also 16 Cal., 93;
Woodbury *v.* Shackelford, 19 Wis., 60, and cases there cited.

This last case (Woodbury *v.* Shackelford, 19 Wis., 60) is cited in support of the proposition that, since the Kansas statute, section 21, makes, in express terms, the fact that the *defendant* is out of the State, or that he has "departed from the State," suspend the operation of the statute, therefore these "general words" "out of the State," "depart from the State," can not, by intendment or construction, have engrafted upon them *other words* that require that his "*residence*," as well as his person, must be absent from the State in order to suspend the running of the statute.

The language we here wish especially to cite is that of Chief-Justice Dixon (p. 60), and is, with its citations, as follows:

"It is a *settled* principle in the construction of statutes of limitation that *general words are to have a general operation*, and unless there can be found *in the statute itself* some ground for restraining it, it can not be restrained by arbitrary addition or abridgment. *No exceptions can be claimed in favor of particular persons or cases unless they are expressly mentioned.*"

The court citing—

Angel on Limitations, secs. 194, 485, 486, 487, and 488;
Beckford *v.* Wade, 7 Vesey, 87;
McIver *v.* Ragan, 2 Wheat, 25;

Demarest *v.* Wynkoop, 3 Johnson's Ch., 436;
Hall *v.* Bumstead, 20 Pickering, 2;
Sakia *v.* Graff, 1 Cowan, 386;
Howell *v.* Hare, 15 Ala., 194;
Bucklen *v.* Ford, 5 Barber, 393 and 97;
Roberdeau's Executor, 3 Cranch., 178.

On this point we especially beg attention to the following holding by this court, as found in the case of Bank of Alabama *v.* Dalton (9 How., 529):

"The legislature having made no exception, the courts of justice *can make none*, as this would be *legislating*. In the language of this court, in the case of McIver *v.* Ragan, 2 Wheat., 29: 'Wherever the situation of the party was such as, in the opinion of the legislature, to *furnish a motive for excepting him from the operation of the law*, the legislature has made the exception, and it would be going far for this court to *add* to those exceptions.' The rule is established *beyond controversy*. It was so held by the Supreme Court of New York, in Troup *v.* Smith, 20 Johns., 33; and again in Callis *v.* Waddy, 2 Munf., 511, by the Court of Appeals of Virginia; and also in Hamilton *v.* Smith, 3 Murph., 115, by the Supreme Court of North Carolina; and in Cocke and Jack *v.* McGinnis, Mart. & Yerg., 361, in the Supreme Court of Tennessee. Nor are we aware that, at this time, the *reverse is held in any State* of this Union. It is the doctrine maintained in Stowell *v.* Zouch, found in Plowden's Reports, 353, and not departed from by the English courts, even in cases of civil war, when the courts of justice were closed and no suit could be brought."

In the case of Amy *v.* City of Watertown, decided in the Circuit Court of the United States for the Western District of Wisconsin in 1884, and reported in 22 Federal Reporter, page 418, the same doctrine just quoted from Bank *v.* Dalton (*supra*), in the opinion by Dunn, J., is distinctly affirmed, in these words:

"Courts can not *engraft on statutes* of limitations exceptions not *clearly expressed;* and where the language of

the statute is perfectly clear, it is the duty of the court to enforce the law as it finds it."

We refer the court to the valuable collection of authorities found at pages 420, 421, of 22 Federal Reporter, which support the doctrine which we have just cited from Bank of Alabama *v.* Dalton, and from Amy *v.* Watertown (22 Fed. Rep., 418).

On pages 13 and 14 of the opposing brief is found a collection of authorities claimed to assert the doctrine that wherever an exception to the statute of limitations expresses the exception in the words such as those found in said section 21, to wit, "out of the State," "depart from the State," there the words mean such absence of residence or domicile from the State as, under the statutes of the State, render service of process upon the absent debtor impossible.

It is unnecessary for us to present an analysis of the decisions and authorities cited on page 14 of the opposing brief for two reasons at least—one, that there are doubtless conflicting authorities on this question, and it is unnecessary, therefore, to go into this wilderness; the other, that there is *no conflict* of authority touching this point *in the Kansas decisions*, as we have seen; and as these Kansas authorities hold, as we have seen, that *personal* absence, as distinguished from absence of residence, suspends the statute, and as it is the *Kansas* decisions, and not the decisions of the other States, interpretative of the Kansas statute, that this court will follow, therefore this also renders an analysis of these cases on page 14 unnecessary.

But if we may venture to apply to this display of cases on page 14, and others, the maxim "*Ab uno disce omnes*," we think an analysis of the case cited on said page 14, of Barnie *v.* Oelrichs (135 U. S., 539), will show that this formidable collection is not quite reliable for the purposes for which it purports to be made.

An inspection of that case of Barnie *v.* Oelrichs will show that it does not sustain the proposition to which it is cited, but on the contrary, negatives it. In that case the exception to the bar, as expressed in the statute of New York, was in these words:

"If, after such cause of action shall have accrued, such person *shall depart from and reside out of this State*, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

The court, on page 534, says:

"As to the statute of limitations it will have been observed that there were two exceptions to its operation: (1) Where the *debtor was absent from the State* when the cause of action accrued; (2) where the debtor, after the cause of action had accrued, departed from *and resided* out of the State. Under the first exception *absence was sufficient to avert the bar*, because the statute did not commence to run until the return of the *debtor* into the State, and such return, it was decided, must be open and notorious so that the creditor might, with reasonable dilligence, find his debtor and serve him with process. (Ingle *v.* Fisher, 102 U. S., 400.) But, to bring the case within the *second* exception, something *more than absence was essential to be shown.* In Wheeler *v.* Webster, 1 E. D. Smith, p. 1, Ingraham, speaking for the New York Court of Common Pleas (this composed of Ingraham, Daly, and Woodruff, JJ.), said: 'It was necessary to prove that the debtor departed from the State, and *also that he resided out of the State.* The evidence did not show this and, for ought that is in proof before us, the absence might have been temporary excursions for pleasure or business with a return to the State as the residence of the debtor.'"

At the bottom of page 533 this court, speaking of the meaning of the word "resident" (which is found in this statute of New York then under consideration), says:

"The *transient visit* of a person for a time at a place does not make him a *resident* while there; something

more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of the term. The settled rule that a person may be a resident in one State and have his family in another was recognized, and the decision has been often cited with approval by the courts of New York as well as of many other States."

This court, therefore, expressly decides that mere *personal absence* from the State, or the words "depart from the State," as found in the statute of New York, meant a totally *different* thing from *residing out of the State;* that the words of the first exception in the statute of New York, to wit, the words "depart from the State," were, taken alone, *sufficient* to avert the bar, because the statute did *not* commence to run until the return of the debtor to the State, and, besides, held that the return must be open and notorious, so as to put the statute in motion; whereas, to bring the words within the second exception, to wit, that he *resides* out of the State, something more than absence was essential.

This case, therefore, is a direct authority in favor of our main proposition, to wit, that when the statute of Kansas says that a statute of limitations shall not run when a defendant is "out of the State" (the words not being "*residing* out of the State," but "out of the State"), it there means personal absence from the State and not residence out of the State.

The important effect of this doctrine, so explicitly held by this court as just cited from Bank *v.* Dalton (*supra*), is that when a statute, in explicit and unambiguous terms, makes absence of the defendant as distinguished from absence of his residence, as well as himself, from the State to constitute the bar, it is not permitted to the courts to engraft upon these unambiguous provisions an additional condition or requisite in order to suspend the

statute, to wit, in this case that the *residence* must be absent as well as the defendant.

The effect on this case of the application of this doctrine, taken in connection with the principles settled in the authorities found in Ritz *v.* Wood (109 U. S., 187); Wood on Limitations, sec. 7, p. 14; Simonton *v.* Winter (5 Pet., 141); Mandeville *v.* Wilson (5 Cranch., 18), cited on pages 8 and 9 of defendant's opening brief, and in further connection with what we hereinafter submit, is to show that the present case is not barred by the statute.

How Plaintiff in Error Makes Out the Bar.

We now come to the question whether, by the decisions of Kansas as they existed at the time the case was decided below, the *death* of plaintiff's intestate, Bauserman, on the 25th of July, 1881, suspended the running of the statute "*until*" an administrator was appointed.

The position of the brief of plaintiff in error on this point is stated at pages 18 and 19, and is in substance this, that because the statute of limitations had begun to run before the death of the intestate, and because that by the compiled laws, section 37, article 1, chapter 12 (R., p. 33), a creditor may have an administrator appointed where the appointment is not procured by a widow or next of kin within the thirty plus the twenty days mentioned in that section, therefore the death of the intestate does not suspend the running of the statute *except during the fifty days*, which must elapse before the creditor *can* take out letters.

Applying this rule to the case, the opposing brief makes out the alleged bar of five years substantially thus:

(*a*) Because the petition alleges an absence of the debtor from the State of "more than five years" (R., p. 1); therefore, taking the averment most strongly against the

pleader (opposing brief, p. 31), it *confesses* that the absence, prior to death, was only five years and one day.

(*b*) The petition shows that the note matured on the 2d of July, 1875, and that suit was instituted the 13th of February, 1886; thus showing an elapse of ten years, seven months, and seven days between the accruing of the right of action and the institution of the suit.

(*c*) Subtracting said five years and one day, plus the fifty days named on page 31 of opposing brief, leaves five years, five months, and nineteen days during which the statute ran and barred the suit, even granting that said five years and one day is not counted in making out the bar. (See pp. 31 and 32 of opposing brief.)

Reply.

There are, we submit, several replies to this contention:

One is, that at the time this decision below was made it was the *settled* construction of the Supreme Court of Kansas that the running of their statute of limitations of Kansas was suspended, by the death of the debtor, not merely for "fifty" days, but "until" the appointment of an administrator upon the deceased debtor's estate.

Another reply is, that even granting that the limitation is rightly laid down in Bauserman *v.* Charlott (*supra*), yet since even that case admits that the debtor's death does suspend the statute of limitations for a reasonable time (46 Kan., 485, 486), and since, in the case at bar, the five months and nineteen days, mentioned on page 32 of the opposing brief, during which that brief alleges that the suit was delayed in excess of the five years' limitation established by the statute, is not an unreasonable delay, therefore, even according to Bauserman *v.* Charlott, the case at bar is not barred because said delay of five months and nineteen days, in excess of the delay allowed by the statute, can not be pronounced, *as a matter of law*,

an unreasonable delay under the conditions shown by this record, where the creditor was, during all the time after the maturity of his note, resident of a foreign State.

A third reply is, that the petition does not aver, nor does it admit, that the personal absence of the intestate from Kansas, after the maturity of the note, and prior to his death, was not *more* than five years and one day (see brief of plaintiff in error, pp. 30 and 31), but, on the contrary, it is in its legal effect equivalent to an averment that such absence was such as prevented a bar.

In presenting these replies to the contention of the opposing brief, we notice first the proposition (plaintiff's brief, 31) that the face of the petition *confesses* that the absence of the intestate from Kansas prior to his death, and which we claim to be time during which the statute of limitations did not run, was *no more* than five years and one day, and that, deducting these five years and one day elapsing between the time the note matured and the death of the intestate, leaves more than a year prior to the death during which the statute of limitations did run, and, adding this one year to the four years, seven months, and twelve days which elapsed between the death of the intestate and the institution of the suit, shows the note sued on to be barred.

This position, asserting that the face of the petition shows the note sued on to be barred, is one that *assumes* that the time between the death and the appointment of a ministration is not deducted from the period making up the bar. We shall notice presently the error involved in this *assumption;* but now, assuming as just stated, that this time between the death and the appointment of administration (less fifty days) is counted in making up the bar, we deny that the face of the petition itself, as a matter of law, shows the note to be barred.

Stated in other words, we assert that the petition shows that the absence from the State prior to the death was

such in duration as to deliver the note from the bar—this because of the *exceptions* which we now state to the rule that the averments of a pleading will be taken most strongly against the pleader. This maxim is appealed to in the opposing brief at page 31 in its endeavor to make out the proposition that the petition shows that the note sued on was barred, and that, therefore, there was error in overruling the demurrer to the petition, etc.

At side pages 241 and 242 of 1 Chitty's Pleadings the author states this rule in these words:

"It is a maxim that everything shall be taken most strongly against the pleader, or rather that if the meaning of the words be equivocal they shall be construed most strongly against the party pleading them, for it is to be intended that every person states his case as favorably to himself as possible. But in applying this maxim the other rules must be kept in view, and particularly those relating to the facts of which the courts will *ex officio* take notice without their being stated in pleading; and the maxim itself must be received with some qualification, for the language of the pleading is to have a reasonable intendment and construction, *and where an expression is capable of different meanings that shall be taken which will support the declaration, etc., and not the other which would defeat it.*"

Citing Wyat *v.* Aland, 1 Salk., 325;
King *v.* Stephen, 5 East, 257;
Amherst *v.* Skinner, 12 East, 270.

In this case it is evident that the pleader meant, in substance, to aver that whilst he could not state the exact time of absence, he could state that it was in excess of five years and that it was such as to prevent the bar.

In other words, this indefiniteness, or susceptibility of different meanings, "shall be taken" in such a way as to support the object of its introduction—that is, will be taken in the sense "which" (here quoting Chitty) "will support the declaration, and not the other which would defeat it."

Or, take another exception to this maxim, stated by authority equally high with that of Chitty, to wit, Broom's Legal Maxims, s. p., 601, where, after stating the maxim, the author adds:

"Nor does this maxim" (taken most strongly against the pleader) "just cited apply to the pleading of matters *which are peculiarly within the knowledge of the opposite party.*"

Citing Murphy *v.* Glass, L. R., 2 P. C., 419.

"It has, indeed, frequently been laid down that ambiguity is *cured by pleading over;* and that, at subsequent stages of the cause, that construction of the ambiguous expression must be adopted which is most favorable to the party by whom it is used. 'If,' said Maule, J., 'the language of the declaration is ambiguous, and the defendant pleads over, it must, if capable of such a construction, be taken in a sense that will require an answer.'"

Citing Boydeil *v.* Harkness, 3 C. B., 171. (54 E. C. L. R.)

The case at bar is one peculiarly within the reason of this exception, asserting that where a matter is ambiguously stated, which is peculiarly within the knowledge of the adverse party (in this case within the knowledge of the family and administrator of the intestate), there the ambiguity is construed most favorably to the pleader.

The plaintiff in the case below was, as the Record discloses, a citizen and resident of Illinois, far away from the State of Kansas, where the usual place of residence of the intestate was; and the family and administrator of the intestate, especially, had full and complete knowledge of the time during which the intestate was absent from the State. Therefore, the maxim has here no application, but on the contrary, according to what has been cited from Chitty and Broom, the interpretation of the ambiguous language must be such as avers an absence

from the State, not only for more than five years, but as much more than five years as will support the declaration, and none of the authorities cited in the opposing brief will be found at war with these quotations from Chitty and Broom.

Hence it results that these averments as to absence will be construed to aver an absence as much in excess of five years as was necessary in order to support the declaration, to wit, was such as to leave the time of the *presence* of the intestate in the State, prior to his death, so *little* as that, if added to the four years, seven months, and twelve days (minus the fifty days mentioned on page 31 of the opposing brief), the two would not make up the five years required to create the bar. All this is said, assuming (what we deny) that death did not suspend the statute of limitations.

In addition to all this, it must be remembered that neither the answer of the statute of limitations put in by the defendant below (R., pp. 6, 7), nor the proofs in support of the answer, show the personal presence of the intestate in Kansas to have been of *any* duration, not even a day's duration.

(See this discussed and considered at pages 14 and 15 of opening brief of defendant in error.)

Here we leave this point in the opposing brief, confident that the court will not find that the declaration shows on its face the note sued on to have been barred so far as that bar depends upon the duration of the absence of the intestate from Kansas before his death.

Effect of Death in Suspending the Statute of Limitations.

We now turn to a notice of the parts of the brief for plaintiff in error asserting that the statute of limitations ran against the note sued on during the period from the death of the intestate to the time of the commencement

of the suit, minus the fifty days mentioned on page 31 of the opposing brief.

There are two propositions stated in the opposing brief which seem so us to be admissions conclusive against the position that in Kansas the time between the death and the bringing of suit, minus said fifty days, will be counted in making up the bar.

Both of these propositions are found at page 27 of the brief for plaintiff in error, and one is in these words:

"*The rule is well settled here that the statute of limitations, as construed by the highest court of the State, is binding and conclusive upon this court.* (Davie *v.* Briggs, 97 U. S., 628; Tioga R. Co. *v.* B. & C. R. Co., 20 Wall., 137; Kibbe *v.* Ditto, 93 U. S., 674; Bank *v.* Eldred, 130 U. S., 693.)"

The other of these two propositions is found at the bottom of the same page (page 27) of the opposing brief, and is as follows:

"*At the time this case was decided in the Circuit Court, November 26, 1888 (Rec., 10), the Kansas court had decided that the death of the debtor suspended the running of the statute.* (Toby *v.* Allen, 3 Kan., 399; Hanson *v.* Towle, 19 Kan., 373; Nelson *v.* Herkel, 30 Kan., 456.)"

The first of these two propositions, to wit, that asserting this court to be bound by the State decisions, it will be observed, is set forth immediately after citing and relying upon the case of Bauserman *v.* Charlott (46 Kan., 480), and is appealed to in order to induce this court to follow the last-named decision.

The proposition is a sound one as here expressed (assuming that its meaning is as stated below), and is one that must govern the case at bar.

We say it must govern the case at bar because the case at bar is not, in regard to the present point, brought within any of the *exceptions* to the rule requiring Federal courts to follow State decisions, as these exceptions are

presented in the opening brief of defendant in error at pages 15–20.

Or, stating in other words, and more fully, what is here meant by our assent to what has just been quoted from said page 27 of the opposing brief, we repeat our assent thus:

We assume that when the quotation to which we have assented says "the rule is well settled here that the statute of limitations, as construed by the highest court of the State, is binding and conclusive upon this court" it does *not* mean that this court is bound by the construction of the State court in either of the following cases:

(1) When that construction has not been "*settled*" by the decisions of its highest State courts (Fairfield *v.* Galletin County, 100 U. S., 52; 107 U. S., 35; Gelpcke *v.* Dubuque, 1 Wall., 205).

(2) When the decision or decisions of the State court, which this court is urged to follow, did *not exist* at the date of the decision alleged to be erroneous, and which decision, alleged to be erroneous, did adopt the "settled construction" of the statute by the highest court of the State as that construction existed at the date of the decision so alleged to be erroneous.

(3) When, to obtain the alleged "settled construction" by the State courts which you are demanded to adopt, you are compelled to give to the rule requiring you to follow the State decisions that "*retroactive*" operation which is condemned by this court where it has so often held that "*we ought not to give them (the State decisions) retroactive effect*" (Rowan *v.* Runnels, 5 How., 134–139; Douglas *v.* Pike County, 101 U. S., 686), and which retroactive effect would render decisions which were, when made, right (because they adopted the settled construction of the State courts as these existed when the decision was made), wrong and reversible, in the Appellate Court of Errors, because they did *not* adopt State constructions

which did not exist, and therefore *could* not be followed, when the decision sought to be reversed was made.

(4) When the state of things presented by the Record to this court is *not* that one in which this court is required to exercise that "independent" jurisdiction in the administration of State laws, which is "co-ordinate with, and not subordinate to," that of the State courts, and which is asserted in such cases as that of Burgess *v.* Seligman (107 U. S., 33).

(5) The decisions of this court both recognize and expressly assert that this doctrine (that the Federal courts will follow what is, at the time of the decision, the settled construction) applies to all cases where the Federal and the State courts have concurrent and co-ordinate jurisdiction.

See this, amongst others, in the cases found at the following places: 3 How., 460; 7 How., 818; 14 How., 504; 18 How., 502, and 2 Black, 603; 3 Wall., 303; 7 Wall., 283; 9 Wall., 485, 486.

In this connection, as appropriately as anywhere else, we may be permitted to state the rule regarding the habit of this court in adopting the *latest* interpretation by the Supreme Court of the State of its own statutes.

This court, in Gelpcke *v.* City of Dubuque (1 Wall., 205), on this point, after citing the decisions in Iowa upon the question before the court, says:

"It is urged that all these decisions have been overruled by the Supreme Court of the State in the later case of the State of Iowa, *ex relatione*, *v.* The County of Wapello (13 Iowa, 390), and it is insisted that in cases involving the construction of a State law or constitution this court is bound to follow the latest adjudication of the highest court of the State. Leffingwell *v.* Warren (2 Black, 599) is relied upon as authority for the position. In that case this court said it would follow the 'latest *settled* adjudications.' Whether the judgment in question can under the circumstances be deemed to come within

that category, it is not now necessary to determine. *It can not be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union.* Many of the cases in the other States are marked by the profoundest legal ability."

This doctrine is repeated in—

Railroad Co. *v.* Railroad Co., 20 Wall., 151;
Commissioners *v.* Thayer, 94 U. S., 642;
King *v.* Wilson, 1 Dillon, 558;
United States *v.* Huidekooper, 5 Dillon, 285.

In Thompson *v.* Perrine (103 U. S., 806–815), the same doctrine is asserted as that just quoted, and this court, in a case in this respect unlike the one at bar, because arising *subsequently* to the new and changed decision, refused to follow such changed decision, as against the prior construction of the New York statute, such changed decision being that pronounced in Horton *v.* Town of Thompson (70 N. Y., 514).

A fortiori, will this court, we submit, refuse to follow Bauserman *v.* Charlott, which was *not in existence* when the court below rendered its decision, now demanded to be reversed, and which decision in the case at bar followed the settled construction which had *then* existed during the entire history of the State? This case is reaffirmed in Thompson *v.* Perrine (106 U. S., 589).

We therefore assume, when we assent to, *and for ourselves reassert*, what is asserted on page 27 of the brief for plaintiff in error, where it says: "The rule is well settled here that the statute of limitations, as construed by the highest court of the State, is binding and conclusive upon this court;" that this means what this court has so often said in regard to this rule, to wit, that the Federal courts are bound to follow the settled decisions of the Supreme

Courts of the States regarding their own statutes, "only" (here adopting the words of this court in Douglas *v.* County of Pike, 101 U. S., middle of page 686) "*from the time they are made.*"

Or, stating the same thing in other words, the Federal courts will follow these constructions of State statutes (and here again adopting the words of this court in Bolles *v.* Brimfield (120 U. S., 763), "as announced *before* the rights accrued," which are involved.

True it is that some of these cases, where this court says that it adopts these "settled constructions" of the Supreme Courts of the States, are cases where this court was passing upon the matter as to how far a *contract*, made under the influence of a State's construction of its own laws, as this construction stood at the date of such contract, can be affected by future and repugnant constructions by the State courts of the same statutes.

But it is, by many considerations, rendered self-evident that the same limitation as to what class, in point of time, of State decisions it is that the courts must adopt, applies to the case at bar, and to all other cases wherein such "Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to that of the State courts."

Burgess *v.* Seligman, 107 U. S., 33.

Some of these considerations, rendering this, just stated, self-evident, may be thus enumerated:

1. When the Federal court is called on to adjudicate a case, when its jurisdiction is co-ordinate with that of the State, it must *then* adjudicate it according to what is required, by law, under the conditions *then* existing, and the court can not, as is said by this court in Burgess *v.* Seligman (*supra*), "*wait* for the State courts to decide the merits of the controversy and then simply register their decision," should, in the course of the years, some

future State decisions, repugnant to the then existing ones, come along.

2. This adjudication in the Federal courts, giving interpretation to State statutes, not only must be exercised *when* the case is presented without waiting, but it must follow the then existing and settled interpretations of the State laws, and such judgment of the Circuit Court of the United States would be erroneous and reversible in this court if it failed to adopt such *then* settled interpretations by the Supreme Court of the State; and, of course, it *could* not know, or adopt, or follow, some conjectural, future, and unknown changes in such construction.

3. This court, as to all cases like the one at bar, has no *original* jurisdiction, and can receive none, even in virtue of an act Congress, and can only exercise the functions of an *appellate* court for the correction of *actual* errors occurring in the court below.

This court may not, therefore, in its exercise of a purely corrective and appellate jurisdiction, reverse this judgment for other cause than for error which it involved *when made*, and can not destroy the judgment, which was right because it followed the then settled construction, by holding that it was erroneous because failed to adopt a decision which did not exist for years after the decision below was rendered.

This reduction of the position we resist to the absurd is absolute and unqualified, and the position of the opposing brief which we resist in legal effect asserts that had Justice Brewer *not* followed the State decisions as they *then* existed, this court would reverse him, and that it will equally reverse him because he *did* follow the then existing and not some imaginary future interpretation of the statute.

This position, so seeming to us absurd, is really an attempt to secure in this court its sanction of that old sarcasm of the satirist which demanded that—

"You shall be damned if you do, and be damned if you don't."

It must be carefully noted that what we here insist upon requiring the court below and this court to enforce in this case, that settled interpretation of the statute which existed at the date of the decision below, does not mean or hint that such *then* settled construction must in other cases arising after the first "settled construction" was superseded by a different and succeeding one, follow the old and the overruled first "settled construction." On the contrary, we concede that this class of cases will be administered according to that settled interpretation that existed when the cause of action arose, or when the cause of action was adjudicated.

It is due to the opening brief for defendant in error, as that brief appears from pages 15 to 20, to here add that the reason why the authorities there cited are appealed to is the one stated at the bottom of page 15 of said opening brief, to wit, in resistance of the contention which was *anticipated* when the opening brief for defendant in error was prepared (and which has been realized in the brief, for plaintiff in error), namely, that this court is now bound to follow the case of Bauserman *v.* Charlott (46 Kan., 400).

We apprehend that some apology would be required at our hands for *stating*, much less discussing, the reply to the position that the Federal courts must follow, *not* the then existing, but the future interpretation of State statutes, were it not for the fact that the elaborate brief of plaintiff in error strenuously presses upon this court the adoption of this doctrine which we resist.

What was the Settled Construction of Statute of Limitations at Date of Decision Below?

We are now brought to the direct question, and the principal one, and the one that has induced us to resort

to this reply to the opposing brief, to wit, the question whether, indeed, there was, at the date of the decision below by the Circuit Court, a settled construction of the statute of limitations of Kansas, holding that the debtor's death and the absence of administration suspended the running of the statute from the death of the debtor for such time as, applied to the case now before the court, would prevent the bar relied on in the present case, and which settled construction was followed by the court below in the judgment rendered?

We supposed that in our opening brief (pp. 10 to 14) we had shown that the right answer to his question was in the affirmative, and was complete and conclusive. But we find in the opposing brief the remarkable assertion that up to the date of the decision below, the 26th of November, 1888 (R., p. 10), in the Supreme Court of Kansas, *the point had not been made, considered, or decided as to whether the failure of the creditor to take out letters of administration prevented the continuation of the suspension of the running of the statute, which suspension the case* of Bauserman *v.* Charlott (*supra*) confesses to have been caused by the death of the debtor, and confesses that it continued for "a reasonable time."

(See pages 27, 28, etc., of the opposing brief.)

We feel warranted in characterizing this position as "remarkable," which says that at the date of the decision of the case of Bauserman *v.* Charlott the Supreme Court of Kansas had not considered or decided the question whether said suspension continued for such time as would defeat the bar in the case before the court, because of what we now proceed to point out, in the prior adjudication of the Kansas Supreme Court, regarding the *duration* of the suspension of the running of the statute, caused by death and absence of administration.

As a preliminary to our recurring to these prior decisions in Kansas, it is most appropriate to remark

that the profusion of cases displayed in the opposing brief, which hold that as a general rule death does not suspend the running of the statute of limitations where it had begun to run before the death, are wholly inappropriate and out of the case, *provided* the settled decisions in Kansas were that such death and absence of administration does, *in that State*, suspend the statute, for such time, at least, as would prevent the bar pleaded in this case.

They are out of the case simply because it is the settled construction, existing at the date of the decision below by the courts of Kansas of their own statute of limitations that this court is, by the opposing brief as well as by ourselves, demanded to follow in obedience to the law; and, therefore, the fact that other States and statutes may hold differently is entirely inconsequential in the case at bar.

We turn first to the case, cited in our opening brief at pages 11 to 13, of Nelson *v.* Herkel (30 Kan. 456), decided in July term, 1883.

The facts in that case are at said pages carefully pointed out in our opening brief (pp. 11–13). They are, in short, these:

The note of Sarah J. Northrup, on which suit was brought, fell due the 16th of April, 1874.

The said maker of the note, Sarah J. Northrup, died October 19, 1876.

No administration was granted on her estate until July 19, 1881, that being four years and nine months after her death (p. 456).

Suit was brought on the note the 15th of September, 1881 (p. 457).

Hence the right of action on this note accrued two years, six months, and three days before Sarah's death, and the limitation had then run for that period.

Hence, also, if death and absence of administration suspended the statute for no more than fifty days (see

opposing brief, p. 31), this note was barred on the 4th day of June, 1879.

Hence, in order for the court to hold, as it did, that this note, sued upon on the 15th of September, 1881, was not then barred, the court was compelled to find and hold that in that case the absence of administration and the death had suspended the running of the statute for an amount of time equal to that elapsing between the 4th of June, 1879, and the 15th of September, 1881.

It was, therefore, impossible in this case for the court to hold that the note of said Sarah, so past due when sued upon seven years, four months, and twenty-nine days, was not barred by the five years' statute of limitations, unless you substract two years, four months, and twenty-nine days from said seven years, four months, and twenty-nine days, for the time during which the statute did not run owing to Sarah's death and the absence of administration.

It will be seen by the quotation we make on the 12th page of our opening brief, that in this case the *precise* question was made that is made in the case at bar, namely, that the statute of limitations was not suspended during the time from the death to the appointment of administration, it having begun to run in the lifetime of said Sarah.

It is thus further seen that it was impossible for the court, in that case, to sustain the judgment appealed from, as it did sustain it, without solemnly considering and deciding what the opposing brief (pp. 27, 28) says had not, at the date of the decision below, been considered or decided by the court, to wit, the question whether the failure of the creditor to take out letters of administration prevented a continuation of the suspension of the statute of limitations.

Indeed, it is palpable on the face of this decision in the case of Nelson *v.* Herkel that this question, which the

opposing brief says never had been "considered or decided" up to the date of the decision below in the case at bar, was not only the *very* question, but was the *only* question that was presented to the court by the case, to-wit, whether the death of Sarah, and absence of administration on her estate, suspended the running of the statute for that period of two years, four months, and twenty-nine days during which it was indispensable that the statute of limitations should be suspended in order to defeat the bar which the court held was defeated by said suspension.

Not only did the court here "consider and decide" what we have now stated, but it furthermore considered and decided another thing conclusive of the case at bar, to wit, that the construction of the statute of limitations of the State, holding that the death of the debtor and the absence of administration suspended the running of the statute during such absence of administration, was then the "*settled*" construction of the statute as fixed by the Supreme Court.

This will be found in the extract from the opinion at page 12 of the opening brief of defendant in error.

As already remarked, there was absolutely nothing else in the case to control the decision except the question whether the death and absence of administration was such *in duration* as to defeat the bar, to wit, was as much as two years, four months, and twenty-nine days.

There was, therefore, virtually nothing *else* to decide in this case of Nelson *v.* Herkel besides the *very* question which the opposing brief asserts (p. 28) had not been considered and decided at the date of the decision below and *that* question was most carefully considered and was explicitly and unanimously decided.

When the Supreme Court of Kansas in the case of Bauserman *v.* Charlott (46 Kan., 483) says that "this court has never said, *when the question was properly presented*, that

the creditor can *indefinitely* prolong the limitation by his own refusal to act," etc., it must mean that the creditor can not *so* "indefinitely" and unreasonably prolong the time of limitation as would be necessary in order to defeat the bar in the case then before the court, to wit, for *fourteen years* (see p. 482, 46 Kansas); and the court can not mean that a prolonging of the limitation for five months and nineteen days named at page 32 of the opposing brief which would, in the case now before the court, be sufficient to defeat the bar, would be a prolonging of the limitation unreasonably.

We say that the court *can not* mean this because the court had just cited, as a good authority in Kansas, in the preceding sentence, the case of Nelson *v.* Herkel (*supra*), where the court had held *expressly*, as we have just seen, that the death and absence of administration did prolong the limitation *for two years, four months, and twenty-nine days.*

At page 483 (46 Kansas) in this case of Bauserman *v.* Charlott will be found the following words:

"It is also true that this court has said that the death of the debtor operates to suspend the statute. (Toby *v.* Allen, 3 Kan., 399; Hanson *v.* Towle, 19 *Id.*, 273; Nelson *v.* Herkel, 30 *Id.*, 456; Mills *v.* Mills, 43 *Id.*, .)"

Here, then, are four cases cited by the Supreme Court of Kansas in this last decision so relied on by plaintiff in error, where the court itself declares that the Supreme Court had said that the death of the debtor suspended the statute. These decisions, adding to them the decision at the bar which reaffirms said prior decisions, extend from 1866 to the date of the decision in the case at bar, to wit, to the 26th of November, 1888, a period of more than twenty-two years. And to these cases is to be added the case of Carney *v.* Havens (23 Kan., 82), decided by Justice Brewer in 1879, the character of which

is sufficiently indicated in our opening brief at page 11. These cover, within a very few years, the entire *life of the State of Kansas*, and up to the decision of the case of Bauserman *v.* Charlott, there was not a single dissenting opinion in the State.

It would not be useful in this reply to extend the analysis of the cases cited on pages 11–14, inclusive, of our opening brief, but an analysis of them will show precisely what is shown by the case of Nelson *v.* Herkel (*supra*), above commented upon, to wit, that the courts did hold that the death and absence of administration suspended the running of the statute during the continuance of such want of administration.

We will, however, here present one other of these Kansas cases.

The case of Toby *v.* A. K. Allen, administrator of Norman Allen, deceased (3 Kan., 399; see the syllabus of the decision in opening brief for defendant in error, p. 10), was decided in 1866, and is the leading case in Kansas as to the effect of the debtor's death and the absence of administration in the way of suspending the running of the statute of limitations in that State. It is cited in the Digests of the Kansas Reports, and by the Supreme Court of the State in about every case since occurring where the question has arisen, as a case that "considered and decided" the exact point now in question in the case at bar, to wit, as one that held that the death of a debtor after the cause of action had accrued against him suspended the running of the statute of limitations from the time of said death "*until*" the appointment of administration on the estate of the deceased debtor.

That question arose in this case thus: Said A. K. Allen, as administrator of Norman Allen, deceased, and Toby and others, were, by an insurance company, made defendants to a bill to foreclose a mortgage, securing a note made by said Norman Allen to said insurance com-

pany, which bill was filed on the 12th of March, 1864; and as to Toby, who held the junior note and mortgage named below, process was served by publication, the first publication being made July 21, 1864. Judgment by default was rendered on the 18th of November, 1864, against Toby and all the other defendants, foreclosing the mortgage securing said note to said insurance company and ordering a sale. But on the *21st of February, 1865*, Toby, on motion, had the judgment opened up and leave to answer, and put in an answer *on that 21st of February*, in which answer, amongst other things, he set up a *junior mortgage* on the same land as that covered by the mortgage to the insurance company, securing a note to himself, which note *fell due the 1st and 5th of May, 1861*. To this answer of Toby a reply was put in pleading the three years statute of limitations.

Under this state of pleadings the court found as a fact that from the maturity of said note to Toby maturing the 1st and 5th of May, 1861, until the death of said Norman Allen, the maker of the said note, and the appointment of administration on Norman Allen's estate, a period of *189 days had elapsed*, and judgment was rendered for the defendant in error, A. K. Allen, holding that the note set up by Toby was barred.

At the bottom of page 410 of the report it appears that said 189 days covered the time of Norman Allen's (the debtor's) absence from Kansas *and the time that intervened between the death of said Norman Allen and the appointment of A. K. Allen as his administrator*. In behalf of Toby the contention was that the note was not barred, for the reasons set forth in the following extract from the opinion of the court (3 Kan., pp. 411–412):

"It is true that regularly, regardless of the exceptions on account of absence, etc., mentioned in the code, the claim of the plaintiff in error (Toby) would have been barred on the *5th of May, 1864, but that during the interval*

between the maturity of the note and the time mentioned (the 5th of May, 1864) there were 189 days to be excluded from the computation on account of the absence of the maker of the note and the want of administration after his death, which would bring the time at which an action would be barred down to November 10, 1864.

"*The first affirmative action by the plaintiff in error (Toby) upon his claim was taken the 21st of February, 1865*" (this date being the date of his motion to open up and of his filing his claim on his said note and junior mortgage securing the same, and which note matured the 1st and 5th of May, 1861), "at which time he insists it was not barred for two reasons—1st, that the three years' statute of limitations embodied in the code was suspended on the 21st of July, 1864, the date of the first publication, by reason of the commencement of the original suit as to him; and, 2d, it remained suspended for want of the notice contemplated by the 74th section of the act concerning executors and administrators."

The Supreme Court of the State affirmed the judgment of the court below, which held that Toby's note was barred. The court so held because that said section 74 had nothing to do with the suspension of the statute of limitations; and because, *although the said Toby was allowed the benefit of the said 189 days*, during the said absence from the State and the said want of administration on the estate of Norman Allen, yet that 189 days carried the period when the bar was complete only down to the *10th of November, 1864;* and as said Toby's first affirmative action in setting up his claim did not occur until the *21st of February, 1865*, therefore his claim was barred, although he was given the benefit of *said 189* days of absence of administration and absence from the State.

At page 523 (3 Kansas) the Supreme Court, in disposing of this question, states expressly as follows:

"*It is true that the death of the debtor operates to suspend the statute until an administrator is appointed, because there must be a party to be sued.*"

There is another view in which, as seems to us, the present Record shows that the delay in bringing this suit does not show that it was "unreasonable," or involved laches on the part of defendant in error within the sense of the word "unreasonable" as found in Bauserman *v.* Charlott (*supra*), or that defendant in error comes within the provisions of section 64, found on page 5 of the opposing brief, in such way or sense as places the defendant in error in default in the matter of delay of administration.

An inspection of that section will show that if the person first entitled to administer "neglects" to take administration, then it is made to be the duty of the court "to commit administration to one or more of the principal creditors if there be any competent and willing to undertake the trust."

Nothing is better settled in the law than that where the condition of the law, or of the courts charged with the administration thereof, is such that the citizen *can not* bring his suit, that *condition* does by its own operation suspend as to such citizen the running of the statute.

See the cases cited in Braun *v.* Sauerwin (10 Wall., 222); also 6th paragraph of syllabus in Devereaux *v.* Brownsville (29 Fed. Rep., 743).

In the case of "*neglect*" named in said section 64, the failure to appoint administration is by the second clause of said section made to be the failure of the court to discharge an express statutory duty, the court thus temporarily closing its doors to suitors having claims against the estate. This constitutes no fault of the creditor.

But besides this, and what is perhaps still more conclusive, is that section 54 of the act approved the 3d of February, 1859, relating to executors and administrators (being a territorial law), reads as follows:

"Letters testamentary and of administration shall in no case be granted to a non-resident of this territory; and

when an executor or administrator shall become a non-resident, the Probate Court having jurisdiction of the estate of the testator or intestate of such executor or administrator, shall revoke his letters."

This territorial law was re-enacted in 1868, and is found in chapter 37, section 28, page 426 of the general statutes of Kansas, and was in force during the period covered by this case.

The Record shows that during all the years covered by this case the defendant in error was a citizen of Illinois, and this case was transferred to the Federal courts owing to the residence of the parties being in different States.

It was therefore impossible for the defendant in error to become administrator upon this estate of his brother, and he can not be placed in the position which the opposing brief strives to place him in, of having neglected as a creditor to procure administration to be conferred upon himself at the end of the fifty days or at any other time, as contended in the brief of the plaintiff in error.

We conclude this reference to the cases in Kansas affirming that during the period after the debtor's death in which there is no administration the statute of limitations does not run, by referring the court to an extract from the case of Etter *v.* Finn (12 Arkansas, 632–4), decided by the Supreme Court of Arkansas in 1852, being one of the cases cited by the Supreme Court of Kansas in the case of Nelson *v.* Herkel (*supra*). This extract is especially referred to for the purpose of showing how far from being accurate is the position of the opposing counsel that the decisions in these States are uniform in *not* permitting the statute to be suspended where it begins to run before the death of the debtor, and where there was an absence of administration. The extract is as follows:

"As a general rule where a statute commences running it continues to run on until the bar becomes complete. This general rule has been *qualified by this court upon the authority of the decisions of the courts of Maryland, Tennessee, North Carolina, Mississippi, and Alabama, as will be seen by reference to the case of Aiken* v. *Baily, 5 English, 584, where the death of a party has been held to produce a temporary suspension of the operation of the statute, for then there are no parties competent to sue or be sued.* As, for instance, if the payor of a note should die *after* the statute commenced running, but before the statute bar had matured, *the time between the death of such party and the substitution of a new party, executor, or administrator, would not be estimated in computing the time of the statute bar, but the statute would be held to recommence running from the date of the substitution of such new party, and continue to run until the time before the death of the testator and intestate, and that after the substitution of the new party taken together should form a complete statute bar.*

"In this view of the case the replication was clearly defective. It is not shown when the intestate died, nor when letters were granted to the administrator."

Whilst there are portions of the opposing brief which we have not specifically noticed in this reply, we yet deem that what we have gone over covers every material part of that brief, and contains all the reply thereto which we care to make, except that we wish to add the following suggestion in regard to the earnest appeal made by plaintiff in error to this court to induce it to disregard that line of decisions in Kansas to which we have referred, holding that death and absence of administration suspend the running of the statute, and to follow what plaintiff in error contends to be the effect of the decision in Bauserman *v.* Charlott (*supra*).

We wish to suggest, in addition to what we already have suggested, saying that this court "can not be expected to follow every oscillation, from whatever cause arising, that may possibly occur" (1 Wall., 205) in the

decisions of the State courts, and thereby reject such long line of decisions as existed in Kansas at the date of the decision in the court below, that the Supreme Court of Kansas in the case of Bauserman *v.* Charlott (26 Kan., 480), as quoted at the top of page 23 of the opposing brief, where, speaking of the duration of that suspension of the statute of limitations, which is caused by death of the debtor and absence of administration, as settled by the former decisions in Kansas, says of such former decisions:

"But this court has never said, when the question was properly presented, that the creditor can indefinitely prolong the time of limitation."

What we wish especially to fix in the notice of the court regarding this last quoted statement is that it does not contain a denial that the former decisions of the Supreme Court of Kansas had held that death and absence of administration suspended the running of the statute of limitations *until* the appointment of administration. What it does assert is only that they had not held that there was an indefinite prolonging of administration *when the question was properly presented.*

What we wish to say about this statement, which is, by plaintiff in error, so earnestly pressed upon the attention of this court (in addition to what we have already said, that this decision, denying the right of a creditor to indefinitely prolong the limitation is not inconsistent with our assertion that to prolong the limitation for the five or six months which is all that is necessary to defeat the bar in this case) is that the Federal courts can never look into the question whether counsel have "*properly presented*" their case to the State courts, when such Federal courts are deciding upon the question whether they are bound to follow the decisions which they find in the Supreme Courts of the State. If the record of the decision

is not unreasonable,

by the Supreme Court of the State shows that the question was *raised* by the pleadings, and was *within the jurisdiction* of the State court, then the Federal courts will follow (in the classes of cases which we have above explained) the State decisions, although counsel in the State courts may have failed to present the question "properly."

The failure of counsel to "present the question properly" may furnish a reason to the State courts for *changing* their decision. But it can never be presented to this court as a reason why this court should not follow the settled construction of State statutes, as the Federal courts found such construction to exist at the time they were required to make their decisions.

We therefore submit, in view of this entire record, that the conclusion reached by Justice Brewer in the court below was manifestly in accord with the *then existing*, long-continued, and uniform holding of the Supreme Court of the State of Kansas, and that it was not only so in accord with the settled decisions of the State, but was in itself intrinsically right, and that, therefore, the judgment in this case must be affirmed.

SAMUEL SHELLABARGER,
J. M. WILSON,
Attorneys for Defendant in Error.

WASHINGTON, D. C.,
December 22, 1892.